



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

Rodriguez (Flexibility Policy) [2013] UKUT 00042 (IAC)

THE IMMIGRATION ACTS

Heard at: Field House

Determination promulgated:
31 January 2013

On : 16th October 2012

Before
The Honourable Mr. Justice McCloskey
And
Upper Tribunal Judge Spencer

Between

Jovy Octubre Rodriguez

Appellant

And

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: In person, representing herself.

For the Respondent: Ms Gough (Home Office Presenting Officer).

Since August 2009 UKBA has operated a policy relating to the processing and determination of applications under the Points Based System ("PBS"). This was revised with effect from May 2011. In its policy letter of 19th May 2011, UKBA states that during an unspecified trial stage applicants will be contacted where mandatory evidence is missing from their applications and given the opportunity to provide this. UKBA is under a public law duty to give effect to this policy in all cases to which it applies.

As regards all other applications, to which the policy letter does not apply, UKBA case workers and decision makers must be aware of and give full effect to its "Evidential Flexibility" policy document. This requires due appreciation of the discretionary powers enshrined therein to request further information from applicants in any case and the exercise thereof in accordance with established legal principles viz the duties to appreciate the existence of and correctly understand and give effect to the policy; to act fairly and rationally; to take into account all material considerations; to disregard immaterial considerations; to observe the requirements of a procedurally fair decision making process; and to act compatibly with such ECHR rights as may be engaged in a particular case, in accordance with section 6 of the Human Rights Act 1998.

DETERMINATION AND REASONS

The Matrix of this Appeal

1. The material facts underlying this appeal are uncontentious. Jovy Octubre Rodriguez (*"The Appellant"*), who is aged thirty-two years (having been born on 19th September 1980), is a national of The Philippines. She was lawfully present in the United Kingdom from 15th November 2010, having been granted permission to enter for the purpose of studying a professional diploma course in tourism and hospitality management (NVQ Level 5) at Walthamstow Business College. She completed this course in December 2011 and, *en route*, she achieved a further vocational qualification [NVQ Level 3], in health and social care. She was then admitted to the London College of Social and Management Sciences for the purpose of studying a course (QCF Level 6) designed to secure a diploma in business and administrative management. The Appellant's period of permission to remain in the United Kingdom was scheduled to end on 1st February 2012 and, in advance thereof, on 31st January 2012 she applied formally in writing for extended leave to remain.
2. By virtue of the Tier 4 (General) Requirements contained in Appendix C of the Immigration Rules, the Appellant, in order to secure extended leave to remain, was obliged to demonstrate that she had been in possession of £1,200 during a period of 28 consecutive days. In the Appellant's case, this 28 day period began on 28th December 2011 and expired on 24th January 2012. This exercise entailed the completion and submission by the Appellant of a standard official document, the Tier 4 (General) application form (version 07/11). This is a complex form, consisting of 43 pages, which the Appellant duly submitted. Her evidence was that, at this juncture, she received a letter from the Respondent to the effect that "*... a case worker would write to the Appellant as soon as possible if there was any problem with the validity of the application, such as missing documentation*" (per paragraph [13] of the first instance Determination). Neither the Appellant nor the Respondent has been able to produce a copy of this letter, although the Appellant has produced copies of similar letters said to have been sent to fellow students. This is confirmatory of the Appellant's assertion, which was both persuasive and undisputed. We find accordingly.
3. From the Appellant's perspective, the next development was a letter dated 21st April 2012 from the Respondent, refusing her extended leave application. The letter notified the Appellant that the decision was based on the Immigration Rules and the Tier 4 Policy Guidance. Two reasons for the refusal were expressed. Firstly, it was stated that the Appellant had falsely misrepresented her achievements in the TOEIC English Language

examinations, thereby attracting a refusal under paragraph 322(1A) of the Immigration Rules, on account of her alleged deception. Secondly, it was stated that she had failed to score the requisite number of points, 40 in total, for “attributes” and “maintenance (funds)”. The explanation provided was formulated thus:

“Your course fees are £2,000 for the first year of your course and you have paid this fee in full. As such, you are required to show that you are in possession of £1,200 for a consecutive 28 day period to meet the [Tier 4 Guidance requirements]. As the closing date of the bank statements submitted in support of your application are [sic] dated 24th January 2012, you have to show evidence of maintenance for twenty-eight days from 28th December 2011 to 24th January 2012. However, between 28th December 2011 and 24 January 2012 your bank statements state that you are in possession of between just £903 and £1,704. As such, you have not demonstrated that you have the level of funds required to be granted as a Tier 4 (General) student migrant. It has therefore been decided that you have not met the requirements and no points have been awarded for maintenance.”

4. The Respondent’s letter of refusal contains an accurate exposition of the information disclosed in the bank statements submitted by the Appellant with her completed application form. In short, the Respondent’s decision to award the Appellant no points was based on two perceived deficiencies in the financial information supplied by her:
 - (i) The bank statements spanned a period of 17 days only, rather than 28 days.
 - (ii) Whereas these statements disclosed a credit balance exceeding £1,200 for most of this period, the balance fell to £903.74 during four days, from 20th to 23rd January 2012.

This gave rise to the Respondent’s assessment that the application failed on account of insufficiency of funds and insufficiency of period.

The Initial Appeal

5. It is recorded in paragraph [25] of the first instance Determination that, having exercised her right of appeal against the Respondent’s decision, the Appellant compiled a hearing bundle which contained, *inter alia*,
 - (a) A further Lloyds TSB statement spanning the period 23rd December 2011 to 13th February 2012, evidencing a credit balance in excess of £1,200 for the entire period except for the four days between 20th and 23rd January 2012 (*supra*).
 - (b) Statements from the RCBC Savings Bank in the Philippines evidencing that throughout the period in question she had savings there of almost £600.
6. In paragraph [26] of the first instance Determination, Immigration Judge Chamberlain stated:

“However, section 85A of the Nationality, Immigration and Asylum Act 2002 inserted by section 19 of the UK Borders Act 2007 provides that the Tribunal may only consider evidence adduced by the Appellant if it was submitted at the time of making the application”.

This was followed by an observation that the further evidence on which the Appellant was seeking to rely –

“... did not cover the entire period required by the rules, i.e., from 31st December 2011 to 27th January 2012”.

We consider that the Judge was in error in this discrete respect, since the total period to which the further evidence related was one of **53 days** and furthermore (as noted above), the relevant 28 day period ran from 28th December 2011 to 24th January 2012. The effect of all the evidence was that the Appellant proved herself capable of demonstrating at the material time her ability to comply with the Tier 4 (General) requirements. While the Judge does not indicate whether the new evidence would be admitted – and, thus, considered by the Tribunal – it would appear that, by implication, it was excluded. We consider that it had to be disregarded, by virtue of section 85A of the 2002 Act. Thus the judge’s error noted above was immaterial. We too must disregard the further evidence in question. The Judge concluded that the Respondent had correctly declined to award the Appellant any points under Appendix C of the Immigration Rules. The Judge’s second conclusion was that the Respondent’s decision did not infringe the Appellant’s rights under Article 8 ECHR. The appeal was dismissed accordingly.

7. The false representations issue under paragraph 322(1A) of the Rules, which concerned the evidence of the Appellant’s English language qualifications, was resolved by the First-tier Tribunal in her favour. Thus her application and initial appeal failed on the sole ground of insufficient points which, in turn, was based on inadequacy of documentation.

The Central Issue: the Respondent’s Policy

8. The Appellant appealed to the Upper Tribunal. The central focus of her grounds of appeal was a policy operated by the Respondent. This is described as the “*flexibility policy*”. We shall elaborate on its terms *infra*. Two particular matters were not in dispute between the parties. The first is that the Respondent does indeed have a policy of this nature and that this was in force at the time of the impugned decision. The second is that this policy was not applied to the Appellant’s application for extended leave to remain. Building on this factual foundation, the basic contention advanced by the Appellant was that both the Respondent and the first-tier Tribunal had erred in law since the impugned decision was vitiated by “*the Respondent’s failure to abide by the thematic common law requirement of fairness*”. A secondary argument developed by the Appellant was that the decision of Judge Chamberlain was inconsistent with “*a long line*” of other first-tier Tribunal decisions allowing appeals on the basis of the Respondent’s “*failure to apply her published and established policy of flexibility towards PBS applications*”. The Appellant developed her central contention in paragraph 9 of her appeal statement:

“I submit that the IJ erred in her decision in failing to consider that the Respondent erred in law in refusing my Tier 4 application on the ground that she failed to apply her own policy”.

In granting permission to appeal, Upper Tribunal Judge Deans referred to the Respondent’s “policy of flexibility” and commented:

“The findings in the appeal indicate that the Respondent’s consideration of the application was deficient in certain aspects and it is arguable that the judge erred in finding that the Respondent was not in breach of the policy of flexibility in considering PBS Applications”.

This provides the context within which this appeal proceeded and falls to be considered and determined.

9. While it is clear that Appellant raised the issue of the failure by the Respondent to follow her own policy in her Grounds of Appeal to the First-tier Tribunal, it is apparent that the evidence pertaining to the Respondent’s “policy of flexibility” available at first instance was both limited and inadequate. This was, self evidently, unsatisfactory and had three particular facets. Firstly, the initial letter to which the Appellant adverted in her evidence – per paragraph [2] above – was not available (and is still unavailable). Secondly, neither party adduced the substantive UKBA policy document in evidence. Thirdly, the only written evidence relating to the policy was the brief exposition contained in a letter dated 19th May 2011 addressed by UKBA to persons described as “Joint Education Task Force Members”. The main thrust of this letter concerned the imminent commencement of Section 19 to the UK Borders Act 2007. This letter is annexed hereto as Appendix A. Tucked within the text one finds the following passage:

*“While we are confident [that the Points Based System] is accessible and understandable, we also recognise that there will always be potential for human error. UK Border Agency Case Workers employ a measure of flexibility when considering PBS applications. For example, case owners [sic] operate a system which allows them to contact applicants to request further documentation or clarification where appropriate. **In addition a validation stage is being trialled [sic] whereby applicants are contacted where mandatory evidence is missing and given the opportunity to provide it before their application is rejected.** These policies aim to provide excellent customer service and reduce the number of applications falling for rejection.”*

[Emphasis added].

In the first instance Determination, the Judge said the following:

“[27] ...The letter from the UKBA dated 19th May 2011 regarding commencement of this section referred to the ability of case workers to contact applicants. It does not state that they will.”

As appears from the passage quoted above, this is not an accurate exposition of the Respondent's policy. We consider the sentence highlighted in the excerpt quoted to be unequivocal. It is an unambiguous statement to the effect that during a "*validation stage*" (evidently a trial period) applicants **will be** contacted where evidence is missing from their applications and will be given the opportunity to provide such evidence before a rejection decision is made. Furthermore, we observe that the Determination contains nothing further about the discrete issue of the Respondent's policy, notwithstanding the clear espousal by the Appellant of an argument that the Respondent's decision was vitiated by non-compliance therewith.

10. At the hearing before this Tribunal the failure of both parties to produce the substantive UKBA policy document was perpetuated. Given the Appellant's lack of legal representation, this was understandable on her part. However, we cannot condone the Respondent's corresponding failure. The policy became available to and was duly considered by this Tribunal only as a result of the Tribunal sourcing it from the relevant UKBA website. As this clearly forms part of "*the circumstances appertaining at the time of the decision*", in the language of section 85A(2) of the Nationality, Immigration and Asylum Act 2002, this Tribunal is not prevented from considering it. It is a relevant UKBA policy document which was in existence at the material time viz when the impugned determination was made. It is entitled:

"PBS Process Instruction - Evidential Flexibility".

A perusal of the text confirms that there was a predecessor policy, in force from August 2009, having essentially the same thrust viz. empowering case workers, upon receipt of PBS applications, to proactively take steps to have certain errors or omissions corrected. The text explains, with reference to the predecessor policy:

"This instruction only applied to cases which would be refused solely on the absence of a piece of evidence or information. Where the application would fall for refusal even if the missing evidence was submitted, a request to submit this further information would not be made ...

The introduction of this instruction resulted in a reduced refusal rate. However, those that fell for refusal where multiple pieces of information were missing were often successful on appeal."

[Our emphasis]

The background to the extant policy, according to the text, was the stimulus for the introduction of "*two significant changes*" to the policy:

"(1) The time given to applicants to produce additional evidence has been increased from three working days to seven working days; and

(2) There is now no limit on the amount of information that can be requested from the applicant.

In the instructions contained within the policy, caseworkers are directed to request additional information of applicants where they have “*sufficient reason to believe*” that this exists. Certain **examples** - such as bank statements missing from a series - coupled with a **non-exhaustive** list (in Annex A) are provided. It is stressed in the text that this is **guidance to caseworkers**. The latter are also advised that it is open to them to request “*multiple pieces*” of additional evidence. One of the significant features of the policy is the statement that where there is uncertainty as to whether necessary evidence exists the benefit of the doubt should be given to the applicant and the evidence should be requested. The commencement date of this revised and enlarged policy was, on its face, 17th June 2011. The policy document is annexed hereto as Appendix B.

11. At the hearing before this Tribunal, the Respondent did not dispute any of the following:
- (i) Following submission of her completed application, the Appellant received a letter from the Respondent indicating that “... a case worker would write to the Appellant as soon as possible if there was **any problem** with the validity of the application, such as missing documentation” (per paragraph [13] of the first instance Determination – emphasis added).
 - (ii) In the event, no such further letter was transmitted by the Respondent to the Appellant.
 - (iii) The Appellant was at all material times capable of demonstrating her ability to score the requisite number of points.
 - (iv) A simple letter of enquiry/request from the Respondent to the Appellant would have elicited the further information required to demonstrate the Appellant’s ability to score full points.

Furthermore, the Respondent did not dispute that the policies, as described and outlined in paragraphs [9] and [10] above, applied to the processing and determination of the Appellant’s application. We make findings of fact accordingly. We further find that, as regards this Appellant, the dominant policy was that contained in the UKBA letter of 19th May 2011.

Conclusions

12. We consider the passage quoted from the UKBA letter of 19th May 2011 (rehearsed in paragraph [9] above) to be of unmistakable importance and of unambiguously clear import. This letter did not merely notify certain interested agencies of the advent of a new “*flexibility policy*”. **It also heralded unequivocally the introduction of a new practice whereby all applicants would be notified of the absence of mandatory evidence from their applications and would be given the opportunity to rectify the relevant shortcoming prior to rejection.** This is the ordinary and natural meaning of the words in the letter. Notably, there is no suggestion in the text of any limited or select group of applicants. This newly introduced policy is harmonious with the plainly detectable philosophy of progressive relaxation of the pre-2009 rigidity which prevailed in the determination of PBS applications and which, consequentially, had reduced the number of refusals. We consider this construction of the UKBA letter consistent with the evidence

given by the Appellant to the first instance Tribunal and unchallenged by the Respondent at any stage. We consider that, properly construed and evaluated in its entirety, the policy enunciated in the letter required the Respondent to notify the Appellant of the informational shortcomings in her application and to afford her the opportunity of rectification and addition prior to an adverse determination. It is conceded that the Respondent failed to do so.

13. We would add that the Respondent neither adduced any evidence nor advanced any argument calling into question the analysis and construction of its policy letter and policy document set out above. Having regard to the language which the Respondent chose to employ in its policy letter, we consider that a narrower construction is not warranted.
14. The application of a public law template to the factual matrix rehearsed above yields the following analysis. As an elementary principle of public law, public authorities are required to give effect to the policies which they promulgate from time to time. This is so on account of the critical role increasingly played by policy in the exercise of discretionary statutory and other governmental powers. This may also be viewed as a requirement of elementary fairness to affected applicants. Furthermore, this operates as a discipline designed to ensure the maintenance of appropriate standards in the decision making processes of public authorities. A further merit of this requirement is that the public law misdemeanours of failing to take into account all material factors and taking into account alien, immaterial considerations are more likely to be avoided thereby. Thus analysed, the requirement that public authorities should act in accordance with their policies is properly viewed as a principle. This principle, thus formulated, seems to us entirely in accordance with contemporary notions and standards of public law. Of course, Governments are at liberty to revise and revoke their policies from time to time and the principles emerging from the developing doctrine of legitimate expectations confirm this entitlement. Furthermore, Governments are also entitled, within certain constraints, to decide that a published policy will not be applied to a particular case or cases. However, none of these considerations arises in the context of this appeal. The present case is simplicity itself: a relevant policy was adopted and promulgated by the Respondent and, in its determination of the Appellant's application, the Respondent manifestly failed to give effect thereto. In consequence, two errors of public law occurred. The first is that in determining the application the Respondent disregarded a plainly material consideration viz. its own policy. The second is that the decision making process was procedurally unfair, since the policy conferred on the Appellant a procedural right to be afforded the opportunity of correction, rectification and expansion. In the events which occurred, the Appellant was denied this right.
15. An alternative public law analysis may be applied. If the correct assessment is that the governing policy in play at the material time was that contained in the UKBA policy document only, excluding the UKBA letter of 19th May 2011, we find that the Respondent's decision was vitiated on the freestanding ground that the decision making officials, in particular the case worker, were unaware of the policy. As a minimum, alertness to the policy was required. However, there is no evidence of this basic appreciation and we find, on the facts of this particular case, that the policy, with or without the additional ingredients identified in the letter of 19th May 2011, was simply ignored. The public law

error of disregarding a plainly material consideration was thereby committed. On this alternative analysis, the procedural unfairness identified in paragraph [14] also occurred.

16. We have included the second, alternative public law analysis in the immediately preceding paragraph for the following reason. Upon the hearing of this appeal, the Respondent was unable to adduce **any** evidence regarding the duration of the trial period heralded in its letter of 19th May 2011. Mindful of our elementary duty to decide this appeal on the basis of the evidence adduced, we have found as a fact that the Appellant's application was made, processed and determined during the trial period. Accordingly, it was governed by both the UKBA letter of 19th May 2011 and the related policy document. We recognise the possibility that, in **other** cases, the Respondent might adduce evidence concerning the lifespan of the trial period. If, in some other case, the Tribunal were to find as a fact that the trial period had expired with the result that the application under scrutiny was governed by the policy document only, excluding the letter of 19th May 2011, the alternative analysis in paragraph [15] above will hopefully provide some useful guidance. This would have been our approach if the aforementioned hypothesis had applied in this case. The Appellant would have succeeded on this alternative approach also.
17. We are conscious that this is not an application for judicial review and we are mindful of the jurisdictional competence of Judges in the Immigration and Asylum Chambers of both the First-Tier and Upper Tribunals under section 82 of the Nationality, Immigration and Asylum Act 2002. The specific statutory ground of appeal engaged in the present case is that enshrined in section 84(1)(e), which provides for an appeal against an immigration decision on the ground that it is "*otherwise not in accordance with the law*". This is something of a "catch all" provision, which expands the grounds of appeal to the Immigration and Asylum Chambers of the First-Tier and Upper Tribunals beyond the ambit of the specific grounds listed elsewhere in section 84 - such as, to take a prominent example, the ground that the impugned immigration decision "*is not in accordance with immigration rules*".
18. The recent decision of the Upper Tribunal in *T(S.55 BCIA 2009 - Entry Clearance) Jamaica* [2011] UKUT 00483 (IAC) promulgated an instructive reminder of the distinction between the function of appellate tribunals and that of the High Court in applications for judicial review:

"[24] We would add further that the function of judges in the Immigration and Asylum Chambers of both the First-Tier and Upper Tribunals is to decide appeals, rather than supervise the exercise of public law functions by a general judicial review jurisdiction. When judges determine appeals they can decide what the material facts are and proceed from those factual findings to reach conclusions on the statutory grounds set out in Section 82 of the Nationality, Immigration and Asylum Act 2002".

The President then provides a useful summary of the Section 82 grounds:

"(a) Whether the decision is in accordance with the Immigration Rules applicable to the situation in question.

(b) *Whether any discretion afforded by the Rules should have been exercised differently;*

(c) *Whether the decision is in accordance with international obligations reflected in UK Law and Practice; and*

(d) *Whether the decision is in accordance with the law.*

We accept that the 'law' in this context includes the duty to act fairly which in turn includes the duty to have regard to policies that are material to the decision in question."

[Emphasis added]

We consider that in this passage the President was clearly directing his mind to well established public law principles. These impose on all public authorities (inexhaustively) the duties of taking into account all material considerations, disregarding immaterial factors, acting in accordance with the dictates of fair procedures, observing the rule against bias and avoiding trespass into the prohibited territory of *Wednesbury* irrationality. Duly analysed, these entrenched principles operate as tools distributed amongst all public authorities designed to secure a fair, disciplined and properly informed decision making process and, thereby, the avoidance of public law misdemeanours.

19. The following passage in **T** also falls to be considered:

"[25] ...Where an immigration decision is flawed for failure to have regard to an applicable policy outside the Immigration Rules, then immigration judges of both Tribunals have no appellate function to review the merits of the exercise of discretion or judgment required to be made. Except in most unusual circumstances the most that can be done is for the appellate decision to record that the decision making process is flawed and incomplete and so the application or decision in question remains outstanding and not yet properly determined".

The rationale underpinning this passage is in our view clear. Where in the making of an immigration decision a relevant policy has been wholly disregarded, it follows logically that the task of exercising any discretion or forming any value judgment thereunder has not been performed. This will normally give rise to the conclusion that the ensuing decision was unlawful. This species of illegality will usually be addressed and rectified by a remedial order of the Tribunal, the effect whereof requires the Respondent to make the decision afresh. The established practice is that Tribunals give effect to findings of this kind by the medium of an order declaring the decision not to be in accordance with the law, with the result that the application remains outstanding, requiring a lawful decision to be made by the Respondent. As paragraph [25] of **T** makes clear, cases of this kind will typically, though not exhaustively, be characterised by a failure on the part of the public authority concerned to exercise a relevant discretionary power or choice. In the particular context of the present case, the error committed was a failure to give effect to a procedural course promised and dictated by a material policy. We shall return to this issue in the final paragraph of this Determination.

20. We have also considered one further aspect of the decision of the Upper Tribunal in *T*, namely, the statement of the learned President, in paragraph [24], made in the context of section 82 of the 2002 Act, that in considering whether the impugned decision is “in accordance with the law”:

“... the law in this context includes the duty to act fairly which in turn includes the duty to have regard to policies that are material to the decision in question.”

We consider this to be an unexceptional statement of legal principle. We observe that the President preferred to view the duty to have regard to material policies as an aspect of fairness. We consider that this may also be viewed as a freestanding duty rooted in public law, without reference to fairness: see paragraph [14] above. See also Fordham, *Judicial Review Handbook* [6th edition], pp 550-552 and 558-560 and the decisions cited therein.

21. We have considered the recent decision of the Court of Appeal in *Alam and Others - v - Secretary of State for the Home Department* [2012] EWCA Civ 960. This decision was concerned with three conjoined appeals in each of which the Appellant’s application for leave to remain in the United Kingdom as a Tier 4 (General) student migrant under the Points-based system in the Immigration Rules was refused as they had failed to comply with one of the requirements to provide specified documentary evidence. In each case, the missing documentation was available at the stage of the First-Tier Tribunal hearing. The approaches adopted by the Tribunals to the admission of this further evidence had been inconsistent. The statutory provision in play in these appeals was section 85A of the Nationality, Immigration and Asylum Acts 2002 which came into operation on 23rd May 2011. The Court of Appeal disapproved of the Upper Tribunal’s decision in *Shahzad* [2012] UKUT 81 (IAC) that section 85A applies only to applications made to the Secretary of State on or after 23rd May 2011: see paragraphs [34] – [35]. Given the contours of the present appeal, it is appropriate to highlight the fourth ground of appeal in *Alam*: see paragraph [46]. It was unsuccessful. Sullivan LJ, delivering the judgment of the Court, stated:

“[46] UKBA choosing to make improvements to its decision making process as a matter of good administrative practice is one thing, the Court imposing a general legal duty to the same effect upon the Secretary of State is a very different matter. I am not persuaded that the statutory scheme is so unfair that the imposition of such a duty can be justified.”

It is also appropriate to highlight an earlier passage in the judgment:

“[35] 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.”

We note the absence from this passage of any mentioned of the related policy.

22. We are of the opinion that the policy promulgated by the Respondent, considered in its full detail and breadth, is clearly designed to avoid and reduce substantive unfairness to

applicants. We also take into account the observation of the Court of Appeal in paragraph [43]:

“The PBS [Points Based System] is a very detailed scheme and, in order to secure predictability and consistency in a decision making process which has to consider a very large number of applications, it is highly prescriptive.”

While this may be correct in the abstract, we find a clear emphasis in the related policy on increasing flexibility in processing applications and, consequentially, reducing substantive unfairness to applicants. We repeat our policy analysis and construction above and would add the following. Firstly, there is no challenge to the fairness of the statutory scheme as a whole in this appeal. Furthermore, we have construed the UKBA policies [viz the policy letter and the policy document] as shifting the emphasis from mechanistic prescription towards flexibility, discretion and, ultimately, greater fairness to applicants. This, without any artificiality or distortion, is the substance of what the policies themselves proclaim unambiguously to the public. It seems clear from the judgment in *Alam* that the policy analysis and construction and associated doctrinal template which we have espoused and applied above did not feature in that appeal. Furthermore, it appears likely that the fourth ground of appeal did not form the centrepiece of the Appellants’ case.

23. It is also apparent that in *Alam* the Court of Appeal did not have available to it the full evidential matrix considered by this Tribunal: see paragraphs [8]-[10] above. Furthermore, the alternative analyses set forth in paragraphs [14]-[15] above do not emerge in the judgment of the Court. In particular, there is no detailed consideration of the question of whether an immigration decision suffering from the flaws set out in these alternative analyses can be said to be *in accordance with the law*, bearing in mind the statutory grounds of appeal enshrined in section 82 of the 2002 Act. Moreover, the prism applied to the fourth ground of appeal in *Alam* was that of **fairness**. The alternative analyses set forth above, which rehearse and are founded on elementary public law dogma, are to be contrasted. On balance, giving due effect to the doctrine of precedent, we find no warrant for concluding that the decision in *Alam* requires this appeal to be dismissed. Its *ratio decidendi* is such that it is properly distinguishable from the present case.
24. We have also considered the decision of the Court of Appeal in *Baig - v - Secretary of State for the Home Department* [2005] EWCA Civ 1246 and the ensuing decision of the AIT in *AG - v - Kosovo* [2007] UKAIT 00082. As regards the decision in *Baig*, we confine ourselves to the observation that the Court of Appeal proceeded on the basis which we have adopted in the present case, namely, that the Immigration Appeal Tribunal was, as a matter of law, obliged to apply the immigration policy in question: see paragraphs [30] and [34]. We note also that the decision of the AIT in *AG - v - Kosovo* was concerned with the same policy [DP5/96]. This decision addressed, fundamentally, the correct approach to be adopted in appeals involving both human rights and policy issues. Notably, the Tribunal made a distinction between cases where the Respondent has failed to consider whether to exercise a discretion conferred by a declared policy and cases where he has considered whether to do so, but has decided that the discretion should not be exercised: see paragraph [33]. We concur with this distinction, while noting that the present case is of a somewhat different *genre*. We are also alert to the vital consideration of context: in both cases, unlike

the present, the issue under consideration was the exercise of a power conferred by an administrative policy, lying outwith the Immigration Rules, to permit a person to remain in the United Kingdom.

25. Finally, bearing in mind the clearly detectable trend towards increased flexibility and the avoidance and reduction of substantive unfairness to applicants highlighted above, we note that the Secretary of State chose to impose upon herself a duty to request missing documents in the changes to the Immigration Rules which took effect on 6th September 2012. We appreciate that these changes have been modified since by further amendment. Paragraph 245AA of HC 395, as amended, was introduced as follows:

“245AA. Documents not submitted with applications

(a) Where Part 6A or any appendices referred to in Part 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 have 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. The requested documents must be received by the UK Border Agency at the address specified in the request within 7 working days of the date of the request.”

The issue whether the policies which feature in this judgment have survived this amendment to the Immigration Rules was not argued before us and we express no view on it. Given the dates of the application and impugned determination with which this appeal is concerned, which precede the amendment, we are satisfied that it is to be disregarded for present purposes.

26. For the reasons elaborated above, we conclude that the Respondent’s decision was not in accordance with the law and the decision of the First-Tier Tribunal, which espoused this error of law, is unsustainable in consequence. We find nothing in the decisions in *Alam*, *Baig*, *AG or T* to require any different conclusion.

Decision

27. We conclude that the decision of the First-tier Tribunal involved the making of an error on a point of law in a plainly material respect. It endorsed a decision by the Respondent which was not in accordance with the law for the reasons explained above.
28. It is not disputed by the Respondent that if the decision maker had been cognisant of the relevant policy and had given effect thereto by alerting the Appellant to the perceived shortcomings in her application and inviting her to provide further information, her application for extended leave to remain in the United Kingdom would have been granted as she would have demonstrated her ability to satisfy the relevant requirements. On its face, this might suggest that we should remake the impugned decision in the Appellant’s favour. However, we must be mindful of the nature of the legal infirmity which we have found to vitiate the Respondent’s decision. This takes the form of a failure to be aware of and give

effect to a relevant policy. Having regard to the decision in *T*, we declare accordingly and allow the appeal. As a result, the Respondent is under a public law duty to remake the decision lawfully, in accordance with this judgment.

Signed:

Amund McCloskey.

Mr Justice McCloskey,
High Court of Justice of Northern Ireland,
sitting as a Judge of the Upper Tribunal

Dated: 7th January 2013

Appendix A

19 May 2011

Dear Joint Education Taskforce Member

Commencement of Section 19 of the UK Borders Act 2007

I am writing to notify you of our plans to commence Section 19 of the UK Borders Act 2007 on 23 May 2011. Once commenced, it will have effect for appeals heard for the first time on or after 23 May 2011. Appeals that have been part or fully-heard heard by the First-tier Tribunal (Immigration and Asylum Chamber) by this date will not be affected.

Section 19 will restrict the evidence an appellant can rely on at appeal to that which was provided to the original UK Border Agency decision maker. It applies to appeals against immigration decision refusals under the Points Based System (PBS).

As you know the Home Affairs Committee has previously noted that the submission of new evidence at appeal stage was resulting not in a review of a decision at appeal, but rather an entirely different decision being made on entirely different evidence. The Committee commented that such practice was not helpful to the overall integrity of the immigration system. Persons wishing to remain in the UK under the PBS are already required to submit all relevant evidence in support of their application at the time that application is made. In that regard the introduction of this measure does not require applicants to do anything different to what they should currently be doing. Section 19 reinforces this principle and will prevent persons from relying on an expensive and publicly funded appeal to correct their errors in the application process.

In taking the decision to commence Section 19 we have given real consideration to the concerns raised in Parliament during the debates on the UK Borders Act 2007, such as ensuring the application process is clear and that minor errors can be addressed in the application process.

Around 75% of PBS in-country applications are successful at the initial decision stage. To support applicants in the application process guidance is available on the UK Border Agency website including the 'Points Calculator' self assessment tool. Customer feedback suggests the application process to be straightforward and easy to understand. This feedback also reveals that the majority of applicants understand the documentary evidence required in their applications; in-country applicants more so than out of country applicants. We remain committed to making the process as easy to use as possible and are working to make continuous improvements such as the introduction of on-line applications later this year.

While we are confident PBS is accessible and understandable, we also recognise there will always be the potential for human error. UK Border Agency caseowners employ a measure of flexibility when considering PBS applications. For example, caseowners operate a system which allows them

to contact applicants to request further documentation or clarification where appropriate. In addition a validation stage is being trialled whereby applicants are contacted where mandatory evidence is missing and given the opportunity to provide it before their application is rejected. These policies aim to provide excellent customer service and reduce the number of applications falling for rejection.

Yours sincerely

Jeremy Oppenheim

National Lead: Temporary Migration

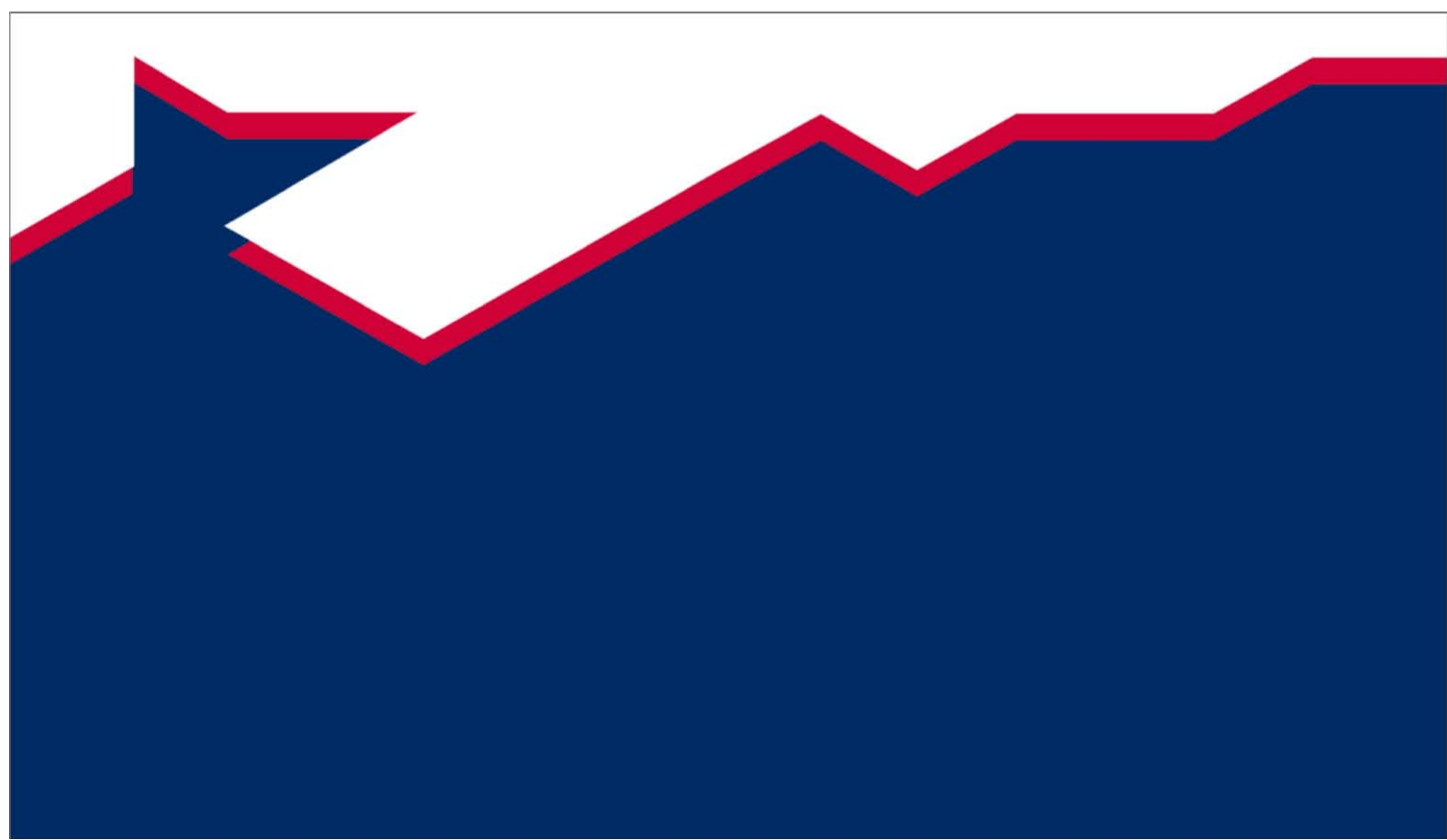
UK Border Agency

Appendix B



**PBS
PROCESS INSTRUCTION**

EVIDENTIAL FLEXIBILITY



EVIDENTIAL FLEXIBILITY

Introduction

In response to significant feedback from the caseworking teams, as well as from our customers, from August 2009 a flexible process was adopted allowing PBS caseworkers to invite sponsors and applicants to correct minor errors or omissions in applications both main and dependant submitted under Tiers 1, 2, 4 and 5.

The instruction enabled caseworkers to query details or request further information, such as a missing wage slip or bank statement from a sequence. Three working days was given to the customer to provide the requested information.

This instruction only applied to cases which would be refused solely on the absence of a piece of evidence or information. Where the application would fall for refusal even if the missing evidence was submitted, a request to submit this further information would not be made.

The introduction of this instruction resulted in a reduced refusal rate. However, those that fell for refusal where multiple pieces of information were missing were often successful on appeal.

Following analysis of allowed appeals and feedback from the National Audit Office (NAO) and Chief Inspector (CI), the original Evidential Flexibility instruction has been reviewed to meet the recommendations put forward in these reports whilst continuing to provide improved levels customer service.

As such, there have been two significant changes to the original Evidential Flexibility instruction:

- 1) The time given to applicants to produce additional evidence has been **increased from three working days to seven working days**; and
- 2) There is **now no limit on the amount of information that can be requested from the applicant**. However, requests for information should not be speculative, we must have sufficient reason to believe that any evidence requested exists.

The evidence requested must only relate to the attributes, not general immigration issues or validation.

NOTE:

Although deadlines will be given for customers to respond to our request for further information, if additional information is received within UKBA (not necessarily by the relevant case owner) prior to the case being despatched this must be taken into account by the caseworker. This applies even if a refusal decision has been completed but the case has not been despatched on CID.

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Procedure This procedure describes the steps to take when an application has missing evidence or there is a minor error.

Step	Action
1	<p>Is there missing evidence, or evidence that is not in an acceptable format?</p> <p>If:</p> <ul style="list-style-type: none"> • Yes – Go to step 2 • No - The case should be considered as normal. The Evidential Flexibility instruction should not be applied.
2	<p>Would the application fall for refusal even if the missing information was provided, or minor error corrected?</p> <p><i>An example of this may be where the applicant has failed to provide sufficient evidence to demonstrate that they meet the requirements of the Maintenance (funds) attribute, but in addition has not declared on their application that they have a conviction which is not spent.</i></p> <p><i>Additionally, if there are any reasonable doubts over the information currently held that would cause caseworkers to seek further verification, this should take place prior to any request for further evidence. This also applies where the application hits a risk profile.</i></p> <p>If:</p> <ul style="list-style-type: none"> • No - Go to step • Yes - Evidence cannot be requested. The application should be <u>refused</u>. All grounds should be included including any attributes where there was any missing evidence or minor errors.

3	<p>We will only go out for additional information in certain circumstances which would lead to the approval of the application.</p> <p>Before we go out to the applicant we must have established that evidence exists, or have sufficient reason to believe the information exists.</p> <p>Examples include (but are not limited to):</p> <ol style="list-style-type: none">1) bank statements missing from a series;2) evidence that specific qualifications have been provided previously (either from reviewing CID, or a legacy application, such as globe);3) evidence detailed on a CAS/ COS is missing; and4) named deposits on bank statements from an employer, but no wage slips provided. <p>The evidence listed in <u>Annex A</u> is not exhaustive, but provides caseworkers with guidance as to the circumstances when evidence can be requested.</p>
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	<p>Is the caseworker satisfied that the evidence, which is missing exists, or has sufficient reason to believe that it exists?</p> <p>Please note: Multiple pieces of evidence can be requested</p> <p>If:</p> <ul style="list-style-type: none"> • Yes - Go to step 5 • No - Evidence cannot be requested. The application should be <u>refused</u>. All grounds should be included including any attributes where there was any missing evidence or minor errors. • Unsure - Go to step 4
4	<p>If the caseworker is unsure as to whether the evidence exists, they should discuss the issue with their HEO, or SCW.</p> <p>Where there is uncertainty as to whether evidence exists, benefit should be given to the applicant and the evidence should be requested.</p> <p>Is the HEO / SCW satisfied that the missing evidence exists, or has reasonable grounds to believe that it exists?</p> <p>If:</p> <ul style="list-style-type: none"> • Yes, or unsure - Go to step 5 • No - Evidence cannot be requested. The application should be <u>refused</u>. All grounds should be included including any attributes where there was any missing evidence or minor errors. <p>Notes should be added to CID to explain why Evidential Flexibility was not applied.</p>
5	<p>The caseworker must contact the applicant / rep / sponsor initially by telephone.</p> <p>The applicant / rep / sponsor should be informed that they have a maximum of seven working days to respond i.e. the missing information should be with the UKBA within this timeframe.</p> <p>We will use the date of receipt at UKBA if this cannot be established then evidence of the date of postage should be considered.</p> <p>We strongly recommend that the information requested be sent by next day special delivery.</p> <p>Original documentation must be provided – we will not accept faxed, scanned or photocopied docs.</p> <p>Go to step 6</p>

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6	<p>When attempting to contact the applicant / representative / sponsor by phone, caseworkers should normally make no more than two attempts using the relevant telephone number (s). If an applicant has a representative the caseworker should initially contact them rather than the applicant.</p> <p>Each time and date of call, and the relevant number contacted should be recorded on CID as if the case is eventually refused, these details will need including in the Immigration History section of the refusal notice.</p> <p>Where ever possible, caseworkers should speak directly to a relevant person, rather than leave a message.</p> <p>Where an email address is held for the applicant / representative / sponsor the telephone call should be followed up by email. As part of the telephone conversation, you should clarify the email address, or if one was not provided as part of the application, ask the applicant / representative / sponsor to provide one (if one exists).</p> <p>Note that there are particular points that need to be made to the applicant / representative / sponsor when requesting further information, these are in <u>Annex B</u>.</p> <p>Additionally please see <u>Annex C</u> “lines to take” document which should answer common questions caseworkers may be asked in response:</p> <p>Have two attempts been made?</p> <p>If:</p> <ul style="list-style-type: none"> • Yes – HEO / SCW is satisfied an appropriate number of attempts have been made – go to step 8 • Yes – HEO / SCW is not satisfied an appropriate number of attempts have been made - Take action as directed by your HEO/Senior Caseworker • No - Go to step 7
7	<p>Continue attempting to phone customer.</p> <p>Ensure that all contact numbers available are used and that where multiple attempts are required the calls are made at different times of the day (e.g. do not make two attempts 15 minutes apart)</p> <p>Return to step 8</p>
8	<p>Where verbal contact with the applicant / representative / sponsor has been made by phone, you must follow this up via an email.</p> <p>Has the applicant supplied an email address?</p> <p>If:</p> <ul style="list-style-type: none"> • Yes – Go to step 9 • No - Go to step 10

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9	<p>When attempting to contact the applicant / representative / sponsor by email, one attempt to each available address can be made. Care should be taken to ensure the correct email address is used.</p> <p>Details of the information that has been requested along with details of any emails sent should be recorded on CID, with copies of emails sent and received printed off and stored with the case file. If the case is eventually refused, these details will need including in the Immigration History section of the refusal notice and copies of emails would be included in any bundle.</p> <p>All emails should be sent via the team mailbox, not from an individual's personal mailbox. This allows other team managers and caseworkers to access any responses in the case owner's absence.</p> <p>Caseworkers should refer to the standard email / letter templates in <u>Annex D</u> when contacting to customers.</p> <p>For Employment Route colleagues it is important that you include (EV) after your team name. This allows ERWT colleagues to sift out this post and ensure that it is prioritised.</p> <p>Additionally please see the <u>Annex C</u> "lines to take" document which should answer common questions caseworkers may be asked in response:</p> <p>Have the email(s) bounced back / been returned as undeliverable?</p> <p>If:</p> <ul style="list-style-type: none"> • Yes – Go to step 10 • No - Go to step 14
10	<p>Have you been able to contact the applicant / representative / sponsor by telephone?</p> <p>If:</p> <ul style="list-style-type: none"> • Yes – Go to step 12 • No - Go to step 11
11	<p>As we have been unable to contact the applicant / representative / sponsor by telephone and email, we should issue them with a letter confirming the information that is required.</p> <p>It should be noted that if a letter is sent, the seven day deadline starts from the date of the letter (even if the caseworker has tried to contact the customer via other methods prior to this).</p> <p>Go to step 13</p>
12	<p>As we have been unable to follow up telephone and email contact with the applicant / representative / sponsor by letter, we should issue them with a letter confirming the</p>

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	<p>information that is required.</p> <p>It should be noted that if a letter is sent, the seven day deadline starts from the date of the telephone call to the applicant / representative / sponsor to request the information.</p> <p>Go to step 13</p>
13	<p>When attempting to contact the applicant / representative / sponsor by post, one attempt to the contact address stated on the application form can be made. Care should be taken to ensure the correct address is used.</p> <p>Details of any letter sent should be recorded on CID and copies of letters sent and received should be printed off and stored with the case file. If the case is eventually refused, these details will need including in the Immigration History section of the refusal notice and copies of letters would be included in any bundle.</p> <p>All letters should be sent via 1st class post.</p> <p>Caseworkers should refer to the standard email / letter template in <u>Annex D</u> when contacting customers. The contents of this template should be copied into an ICD.1100 letter in Doc Gen to ensure that a record of this contact is kept on the system. Caseworkers should ensure that the telephone number included on the letter is correct.</p> <p>Tier 1 and 4 – Immigration Enquiry Bureau = 0870 606 77 66 Tier 2/5 – Customer contact Centre = 0114 207 4074</p> <p>For Employment Route colleagues it is important that you include (EV) after your team name. This allows ERWT colleagues to sift out this post and ensure that it is prioritised.</p> <p>Additionally please see the <u>Annex C</u> “lines to take” document which should answer common questions you may be asked in response:</p> <p>Go to step 14</p>

14	<p>The case should be placed in BF for nine working days following existing procedures. Note that two further working days have been added to allow for the movement of evidence from workflow to the case working teams.</p> <p>Each operational Tier has a specific Evidential Flexibility BF spreadsheet to recorded cases of this type. <u>This must be completed fully and care taken to ensure details are correct.</u></p> <p><i>The information contained on the Evidential Flexibility BF spreadsheet will be reviewed and reported on to identify the success of the instruction and to determine whether future amendments should be made.</i></p>
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	Go to step 15.
15	<p>After nine working days (with the day of contact starting as day one), have elapsed since the customer was contacted (either spoken to verbally on the telephone, time email was sent or time the letter was sent), the case should be taken out of BF and reassessed.</p> <p>If a caseworker receives all of the requested information / evidence before the nine days have elapsed, the case should be considered immediately.</p> <p>Caseworkers should take care to check CID comments to see if additional information has been received.</p> <p>Has the relevant information been received by UKBA?</p> <p>If:</p> <ul style="list-style-type: none"> • Yes - Go to step 16 • No and contacted by phone/email - Go to step 16 • No and contacted solely by letter - Go to step 17
16	<p>If the information is with UKBA but not yet with the relevant caseworker, hold the case until post received.</p> <p>Case should then be considered as normal, including any additional information supplied.</p> <p>If the case is to be refused, all attempts to contact the applicant and any responses they gave should be included in the immigration history (SP4 section of the refusal notice) e.g.</p> <p>On (enter date and time if phone contact) we contacted you by telephone/email/letter and requested (enter details of required evidence).</p> <p>On (enter date) we received (enter full details of information received) and have used this when considering your application for leave to remain.</p> <p>Any written forms of contact and any written responses should be included in any bundle that needs creating.</p> <p>Caseworkers must ensure that the BF spreadsheet is fully updated when the case is closed.</p> <p>Note: If any additional evidence is received after the deadline but prior to the case being despatch on CID, this information will need to be considered by the caseworker and the case reassessed.</p>
17	The case should be referred to HEO/Senior Caseworker for a decision to be made on what action should be taken.

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	<p>Should the case be considered on the evidence currently available? If:</p> <ul style="list-style-type: none"> • No – Go to step 18 • Yes - Go to step 19
18	<p>Take action as directed by your HEO/Senior Caseworker.</p>
19	<p>Case should then be considered as normal on the evidence held by UKBA.</p> <p>All attempts to contact the applicant and any responses they gave should be included in the immigration history (SP4 section of the refusal notice) e.g.</p> <p>On (enter date and time if phone contact) we contacted you by telephone / email / letter and requested (enter details of required evidence). No response was received.</p> <p>or</p> <p>On (enter date and time if phone contact) we contacted you by telephone / email / letter and requested (enter details of required evidence). You advised UKBA that you were unable to provide the required information.</p> <p>Any written forms of contact and any written responses should be included in any bundle that needs creating.</p> <p>Caseworkers must ensure that the BF spreadsheet is fully updated when the case is closed.</p> <p>Note: If any additional evidence is received after the deadline but prior to the case being despatch on CID, this information will need to be considered by the caseworker and the case reassessed.</p>

Conclusion The Evidential Flexibility instruction has been applied and the case has been decided.

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Annex A

Evidential flexibility - Documents which it maybe appropriate to request for each Tier

Tier 1 – All case types

- o Qualification (T1 General and Post Study Work) –
 - missing academic certificate
 - details of the date of award missing
 - evidence that is copied instead of an original
 - legacy systems / previous applications indicate that the qualification exists
- o Previous Earnings (T1 General) –
 - missing wage slips
 - missing bank statements from a series
 - evidence that is copied instead of an original
 - bank statements not in the desired format
- o English Language (T1 General and Entrepreneur) –
 - missing English language certificates
 - missing academic certificates
 - evidence that is copied instead of an original
 - legacy systems / previous applications indicate that the qualification / evidence exists
- o Maintenance (T1 General, Post Study Work and Entrepreneur)
 - missing bank statements from a series
 - missing information from bank letters
 - evidence that is copied instead of an original
 - bank statements not in the desired format
- o T1 Entrepreneur
 - missing information from the required letters / documents
 - evidence that is copied instead of an original
- o T1 Investor
 - missing information from the required letters / documents
 - evidence that is copied instead of an original
- **Tier 2/5 – All casetypes**
 - o Maintenance
 - missing bank statements from a series
 - missing information from bank letters
 - evidence that is copied instead of an original
 - bank statements not in the desired formal
 - o Qualification
 - missing academic certificates
 - details of the date of award missing

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- evidence that is copied instead of an original
- legacy systems / previous applications indicate that the qualification exists
- o English Language –
 - missing English language certificates
 - missing academic certificates
 - evidence that is copied instead of an original
- o Certificate of Sponsorship
 - missing SOC code from the CoS
 - obviously incorrect SOC on the CoS
 - CoS not provided but employer is approved on metastorm
 - Information missing from the CoS
- **Tier 4 – all casetypes**
 - o Maintenance
 - Missing bank statements from a series
 - Missing information from bank letters
 - Evidence that is copied instead of an original
 - Bank statements not in the desired format
 - Third party maintenance information missing
 - Missing Birth Certificate needed as evidence of relationship with Sponsor.
 - o CAS
 - Evidence of progress detailed on CAS, but missing from application
 - CAS not provided but Educational Provider is an approved Sponsor.
 - Evidence used to assess suitability for course not included
 - ATAS certificate not provided
- **Dependants – all Tiers**
 - o Evidence of Relationship
 - No evidence of relationship, eg Birth Certificate, Marriage Certificate.
 - o Maintenance
 - missing bank statements from a series
 - missing information from bank letters
 - evidence that is copied instead of an original
 - bank statements not in the desired format

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Annex B

EVIDENTIAL FLEXIBILITY CASE WORKING PHONE SCRIPT

INTRODUCE YOURSELF

Good Morning /Good Afternoon /Good Evening.

My name is xxxxx; I am calling from UK Border Agency in relation to your/your client's (name) Tier 1/ 2/ 4/ 5 application(s).

EXPLAIN THE REASON FOR THE CALL

The application(s) is / are currently being considered and I am calling to explain there is a minor omission with regards to the evidence / information required.

EXPLAIN WHAT INFORMATION / EVIDENCE IS MISSING AND SPECIFICALLY WHAT YOU REQUIRE THEM TO SUBMIT.

We are therefore asking you to submit Refer to **Annex A**

ENSURE THAT YOU CLARIFY THE KEY POINTS ABOUT SUBMITTING WHAT IS REQUIRED

We are only able to accept the original document(s) which are received within UK Border Agency within 7 working days of this call. We strongly recommend that you send the document(s) by special next day delivery. Please note no further extensions will be given if the requested information is not provided within the 7 working days.

EXPLAIN WHERE TO SEND THE INFORMATION

The document(s) should be sent to....

END THE CALL

Thank you

NB: If the applicant/rep/sponsor becomes difficult or rude at any point during your conversation you should refer to you manager

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Annex C

Standard lines to take regarding Evidential Flexibility caseworking instruction.

- Who does this new instruction apply to?

The instruction applies to any Tier 1, 2, 4 or 5 migrant application which is under consideration as of 28 March 2011, as well as any applications submitted on or after this date. This instruction applies to main applicants and their associated dependants regardless of whether the dependant applies separately at a later date.

- I cannot provide the document within the time allowed / Why won't you give me more time to provide the evidence?

We will allow up to 7 working days. If we have not received the evidence requested within this time, a decision will be made based on the evidence provided with the application form. The guidance clearly states what evidence should have been provided originally in support of an application. We are not able to hold cases open for extended periods.

- Does the information you require need to have been sent within the 7 working days, or does it need to have been received within the 7 days?

The information required must have been received by the UKBA within the 7 working days, starting from today. We therefore strongly recommend you send the evidence by special next day delivery.

- Can I get back to you with the recorded/special recorded delivery reference number?

This shouldn't be necessary. You will be able to track for yourself whether what you have sent has arrived with UKBA.

- Reps/Sponsor/Applicant telephones to complain about cases which were previously refused on the same basis

As of 28 March 2011 we will request specific documents if they have been omitted from the application, for cases currently outstanding as of this date, or received on or after this date.

Please note any applications which were decided before the above date were considered against the operational procedures in place at the time.

As the Points Based System continues to bed in we will, where appropriate and practicable, endeavour to contact customers to correct minor omissions or errors in their applications.

Applications can only be considered in accordance with the policy and operational procedures in force at the time of consideration. The UKBA reserves the right to change these.

- A rep/sponsor/applicant telephones to ask why we are asking for certain documents and not others

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Where appropriate and practicable we will endeavour to contact customers to correct minor omissions or errors in their applications. However, there are certain requirements which must be met for a PBS application to be considered valid, which includes provision of key mandatory documents, such as the passport.

The requesting of Mandatory documentation or information to make an application valid is governed by

- Can the applicant drop the document requested off at the PEO?

No. We strongly recommend you send the evidence required by special next day delivery.

- Can I arrange a courier to deliver the required information

No. We strongly recommend you send the evidence required by special next day delivery.

*****FOR INTERNAL USE ONLY NOT FOR EXTERNAL COMMUNICATION*****

(If in exceptional circumstances it might be appropriate to accept delivery of the documents via courier the caseworker should discuss this with the HEO/Senior Caseworker)

- Can I fax the evidence to you?

In line with published guidelines we only accept original documentation.

- You previously refused my application on missing information so I re applied with the correct information. Can I have a refund for the case you refused as you did not give me a second chance to provide the information?

Unfortunately not. As of 28 March 2011 we will request specific documents if they have been omitted from the application, for cases currently outstanding as of this date, or received on or after this date.

Please note any applications which were decided before the above date were considered against the operational procedures in place at the time.

As the Points Based System continues to bed in we will, where appropriate and practicable, endeavour to contact customers to correct minor omissions or errors in their applications.

Applications can only be considered in accordance with the policy and operational procedures in force at the time of consideration. The UKBA reserves the right to change these.

- I have an outstanding appeal for a case that was refused on this basis. Will you reconsider?

No. The case was considered on the evidence and operational procedures in place at the time of application, therefore we will not reconsider on this basis.

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Applications can only be considered in accordance with the policy and operational procedures in force at the time of consideration. The UKBA reserves the right to change these.

- I have forgotten where I should send my documentation?

The request for further information will have been followed up in writing via email where an email address has been provided. You should check this for details of where to send the information to.

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Annex D

Email / Letter template (evidential flexibility)

Dear Mr / Mrs / Miss / Ms / Dr [Insert name],

Re: [Applicant name] [country] [DoB]: Home Office reference: [insert reference number]

Thank you for your / your client's / your clients' application(s), which is / are currently being considered. Please note that we have identified a minor omission with regards to the evidence that has been submitted.

We are therefore asking you to submit [Caseworker to select relevant document(s) From **Annex A** and give specific details where appropriate, e.g. page 3 of the bank statements was not provided. Remember you are not limited to requesting one piece of information]

Please note that we are only able to accept the original document(s) received within UK Border Agency within 7 working days of this email / letter. We therefore strongly recommend that you send the document(s) by special next day delivery. No further extension will be given if the requested information is not provided within the seven days.

Please send this to the following

address: [Insert Caseworker Name]

Tier (1,2&5, 4) – (team name) (EV)

Vulcan House – (Steel/Iron)
North East, Yorkshire and Humber Region
UK Border Agency
PO Box 3468
Sheffield
S3 8WA

If you have any further questions in relation to this request please contact our Immigration Enquiry Bureau on 0870 606 7766.

Yours sincerely,

[Insert Caseworker Name]

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Document Control Record

1. Document Details:

Author:	EROS
Author's Contact Details	207 1219
Business Prime	EROS
Business Prime Contact Details	207 1219

2. Version History:

Only the latest three versions need to be shown in the table below

Version Number	Date (DD-MM-YY)	Changes implemented
1.1	14.06.11	<p>Introduction- removed 'The following guidance should be used in conjunction with the <u>Evidential Flexibility Casework Instruction</u>'</p> <p>Step 1 -Amended from</p> <ul style="list-style-type: none"> • Yes – The case should be considered as normal. The Evidential Flexibility instruction should not be applied. • No – Go to step 2 <p>to</p> <ul style="list-style-type: none"> • Yes – Go to step 2 • No – The case should be considered as normal. The Evidential Flexibility instruction should not be applied. <p>Step 3 -Added- '/COS' -removed attachment 'Documents which it maybe appropriate to request for each Tier' and placed in Annex A</p> <p>Step 6 -removed attachment '<u>CASE WORKING PHONE SCRIPT</u>' and placed it in Annex B -removed attachment 'Standard lines to take regarding Evidential Flexibility caseworking instruction' and placed in Annex C</p> <p>Step 9 -removed attachments for email examples and placed in Annex D</p>

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		-removed attachment 'lines to take' and referred to Annex C Step 13 -removed attachments for letter examples and referred to Annex D -removed attachment 'lines to take' and referred to Annex C
1.0	28/03/2011	New document

3. Latest Version Approved By:

Name	Date
Michelle Joyce	15/06/11