



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

Appeal Number: IA/00745/2014

THE IMMIGRATION ACTS

Heard at Field House

On 2 October 2014

Determination

Promulgated

On 8 October 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

MS GAGANDEEP KAUR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M Dogra, Counsel instructed by Maalik & Co

For the Respondent: Mr M Shilliday, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of India and her date of birth is 20 May 1987. On 30 September 2013 the appellant made an application to vary her leave to remain in the UK as a Tier 4 (General) Migrant. Her application was refused by the Secretary of State on the basis that the appellant had failed to submit two documents in support of her application, which were listed

on the CAS letter that she submitted with her application, namely as follows:

“2 - progress letter for post graduate professional diploma in healthcare management. The letter was issued by CITEC College on 26 March 2012”,

and

“6 - registration certificate as a nurse and midwife on 30 January 2009.

2. The appellant submitted six out of the eight certificates required which were listed on the CAS letter that she submitted with her application.
3. The appellant appealed and her appeal was dismissed by Judge Mayall having been determined on the papers in accordance with the wishes of the appellant. The decision was promulgated on 4 April 2014. Permission was granted to the appellant by Judge of the First-tier Tribunal Page on 14 May 2014. Thus the matter came before me.

The Decision of the FtT

4. The Judge made findings at paragraphs 8, 9, 10 and 11 of the determination:

“8. According to paragraph 245AA of the Rules:

- (a) where part 6A or any appendices referred to in part 6A state that specified documents must be provided, the Entry Clearance Officer, Immigration Officer or the Secretary of State will only consider documents that have been submitted with the application, and will only consider documents submitted after the application where they are submitted in accordance with sub-paragraph (b);
- (b) if the applicant has submitted specified documents in which:
some of the documents in the sequence have been omitted (for example, if one bank statement from a series is missing):
 - (ii) a document is in the wrong format (for example, if a letter is not on letterhead paper as specified); or
 - (iii) a document is a copy and not an original document ...

- (c) documents will not be requested if a specified document has not been submitted

No evidence of any policy imposing any stricter requirement upon the respondent to request missing documents has been put before me.

- 9. The missing documents in this case were specified documents. Accordingly, in my judgment, there was no obligation upon the respondent to afford the appellant an opportunity of submitting the missing documents.
- 10. In the circumstances the appellant did not qualify for an award of 30 points in the attributes section. Accordingly she did not meet the requirements of the Immigration Rules.
- 11. There was no suggestion in the grounds of appeal or statement that the decision was an unlawful interference with her Article 8 rights. Even had there been, in the absence of any evidence on this aspect, I would have been satisfied that the decisions were entirely proportionate.”

The Grounds Seeking Leave to Appeal and Oral Submissions

- 5. The grounds seeking leave to appeal can be summarised. The Judge should have exercised discretion in the appellant’s favour. He did not give consideration to fairness and paragraph 245AA of the Immigration Rules. The Secretary of State should have requested further documents in accordance with evidential flexibility. The documents had already been submitted to the respondent in an earlier application and therefore had been seen by the Secretary of State.
- 6. I heard oral submissions from both parties. Mr Shilliday submitted a copy of the Home Office policy version 5.0 (valid from 7 November 2013). The relevant parts of the guidance can be summarised.

“This guidance pulls together cross-cutting guidance which previously existed in separate products, and combines relevant information from other operational instructions. It supersedes all previous instructions and guidance on evidential flexibility.

Under the evidential flexibility process, if there are minor errors or omissions on specified documents submitted with a valid application but there is enough evidence to show the application would otherwise be granted, you may contact the migrant, sponsor or representative as appropriate for clarification or to request missing documents and/or information.

For applications made on or after 13 December 2012

You can accept a specified document which is:

- in the wrong format, or
- a copy of an original document

if you are satisfied it is genuine and the applicant meets all the other requirements of the Immigration Rules. You do not have to write out in these circumstances.

However, the Home Office reserves the right to request the specified original documents in the correct format in all cases where paragraph 245AA(b) applies, and to refuse applications if these documents are not provided as set out in this paragraph.

All documentary evidence received must be treated in the same way as any submitted with the initial application.

For applications decided on or after 1 October 2013

Further to amendments made on 13 December 2012 under evidential flexibility you do not have to write to an applicant about a specified document if it does not contain all of the specified information where you can get the missing information from:

- other documents submitted with the application
- the website of the organisation which issued the document, or
- the website of the appropriate regulatory body.

For archived versions of the evidential flexibility guidance see related link.”

7. Later in the policy guidance at page 7 the following is stated:

“You must only request additional information if you believe the applicant would meet the requirements of the Immigration Rules, given the opportunity to provide this. If the application would fall for refusal, even if the minor omission was corrected, you must not request additional documentation.”

8. The rest of the policy deals with how the decision-maker goes about contacting an applicant.

9. I heard oral submissions from Ms Dogra in the context of her skeleton argument. Mr Shilliday made oral submissions and he argued that the policy is not as relevant as the Rule and the appellant does not benefit

from paragraph 245. The evidence in this case was missing. It is accepted that the appellant raised the policy in the grounds of appeal, but she did not make a reference to the missing documents in her application. She did not raise what she is now suggesting, namely that the documents had been submitted to the respondent in a previous application.

10. There were two documents listed on the CAS which were not submitted by the appellant with her application. However, in my view there was evidence that the documents were in existence because they are listed on the CAS letter and therefore it can be assumed that they have been seen by the sponsor. There would have been little speculation involved by the Secretary of State and the decision-maker should have considered the policy. I have reached this conclusion having taking into account paragraphs 91, 92 and 93 of **Secretary of State for the Home Department v Rodriguez [2014] EWCA Civ 2**. In my view there was sufficient evidence in order for the decision-maker to find that the policy applied in the appellant's favour.
11. For the above reason, in my view, the Judge made a material error of law and I set aside the decision pursuant to Section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.
12. There is no lawful decision and the application remains outstanding. The decision-maker failed to exercise the discretion invested in him and the decision is not in accordance with the law pursuant to Section 86(3)(a) of the Nationality, Immigration and Asylum Act 2002.

Signed Joanna McWilliam

Date 8 October 2014

Deputy Upper Tribunal Judge McWilliam