



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

Appeal Numbers: IA/24642/2013
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THE IMMIGRATION ACTS

Heard at Field House

On 5th February 2014

Determination

Promulgated

On 17th June 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**(1) MR VEERAVASANTHA RAO RAYIPUDI
(2) MR SUDHEER KUMAR PALADUGULA
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Z Khan (Counsel)

For the Respondent: Mr S Walker (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge M A Khan promulgated on 28th November 2013, following a hearing at Hatton Cross on 22nd November 2013. In the determination, the judge dismissed the appeal of Veeravasantha Rao Rayipudi and Sudheer Kumar Paladugula. The Appellants applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are citizens of India, born on 21st December 1985 and 15th May 1987, respectively, and both have made a joint application as Tier 1 (Entrepreneur) Migrants, on 19th October 2012 and 8th November 2012 respectively. Their application was dismissed by the Respondent on 5th June 2013. There were separate refusal letters similarly worded. The Respondent was not satisfied that the Appellants met the requirements of paragraph 245DD(b) of HC 395.

The Judge's Findings

3. The essential issue in this appeal was whether, documents which the Respondent had indicated by email could be sent to the Respondent decision-maker prior to the time of the decision, had been properly sent, so as to raise an expectation that they would be considered before a decision was made. At the hearing before the judge, the Appellants accepted in a joint statement that they had not been able to send the documents requested by email by the time set for their submission in the Respondent's email, because they had not yet received the specified documents from India themselves (paragraph 27).
4. However, they still nonetheless relied upon the case of **Rodriguez** (which at the time had not been decided on appeal by the Court of Appeal) and their argument was that since August 2009 UKBA had operated a policy relating to the processing of applications under the points-based system which required a degree of evidential flexibility to be shown in cases of this kind. The judge held that, given that the Respondent had not received the documents by the date specified in their email to the Appellants, the applications fell to be dismissed and no issues were raised of evidential flexibility. The Appellants were not entitled to 75 points claimed by them to qualify for Tier 1 (Entrepreneur) status.

Grounds of Application

5. The grounds state that the judge should have taken into account the policy instructions issued to caseworkers that if additional information was received it should be considered. Even though, in this case the information was received after the deadline date set by the Respondent decision-maker, the decision in question still had not been made, and so if the information arrived after the said date, it should have been taken into account.
6. On 17th December 2013, permission to appeal was granted.
7. On 2nd January 2014, a Rule 24 response was entered.

Submissions

8. At the hearing before me, Mr Z Khan of Counsel, submitted that three separate pieces of information had been tendered. There was a letter from the bank, a declaration from the third party Sponsor, and a legal representative's letter. Only the first and second of these documents were questioned. This was clear from paragraph 11 of the refusal letter.
9. Mr Khan submitted that he would have to accept that the original letters did not contain the Appellant's name. However, if one looks at the documents at I1 to I4, it is clear that there were additional documents submitted as well. These were sent before the decision was made. They should have been taken into account. The refusal letter does not even refer to them. Second, paragraph 41-SD does not contain a requirement that there must be a telephone number. It only requires disclosure of a telephone number if one exists. The same applies for an email.
10. Mr Khan further explained that on 10th May 2013, the Secretary of State required of the Appellants to have sent to her the necessary documents within fourteen days. However, the Appellants were in a predicament because they were still awaiting these documents from India. Therefore, the Appellants requested a further extension of time.
11. On 31st May 2013, they did then send the information requested to the Respondent decision-maker. The caseworker did in an email grant a seven day extension. That took the Appellants to 3rd June 2013. However the additional information was sent by the Appellants only on 3rd June 2013 itself. Mr Khan submitted that they would have to accept that it was not sent even by the time of the second extended time limit.
12. However, his point was that the refusal letter shows that the decision was then made on 5th June 2013, and during this time, the late information could have been taken into account. This is not a matter that is covered by the decision in **Rodriguez**.
13. It is a matter, he submits, that is covered by the evidential flexibility policy which states that if additional information is received prior to the decision being made "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 CIDs" (see page 2 of 16).
14. For his part, Mr Walker submitted that there was no evidence that the additional information, which is claimed to have been sent on 3rd June 2013, but prior to the decision being made two days later on 5th June 2013, was ever before the caseworker. Mr Walker, in his usual helpful and constructive manner, assisted the Tribunal by handing up the CID notes, which he maintained had been provided to the original Tribunal judge as well, and these are dated 5th June 2013, and they state that, "note of the third party bank letters that have been provided give the names of the applicants that money is available to them or a contact telephone number

for the third party. Additionally two of the letters are not official headed paper from the bank ...”

15. In reply, however, Mr Khan submitted that, this only made the case for the Appellants easier to dispose of. This is because if one looks at the documentation at I1 to I4, in the Respondent’s own bundle, it is clear that all the information was in fact provided. What is said at CID notes is not correct. Furthermore, if one looks at the lawyer’s letters at J1, it is clear that there was information before the decision-maker which was not properly taken into account.

Error of Law and Remaking the Decision

16. I am satisfied that the making of the decision by the judge involved the making of an error of law (see Section 12(1) of TCEA 2007) such that I should set aside that decision and remake the decision. This case is not expressly about **Rodriguez**, whether before the Upper Tribunal, or whether more recently before the Court of Appeal.
17. It is expressly about the ‘Evidential Flexibility Policy’, and the Notes provided by the Secretary of State to her caseworkers. These make it quite clear (see page 2 of 16), that if information is provided additionally, which is received prior to the decision, then “this must be taken into account by the caseworker” even if the refusal decision has been completed, provided it has not been despatched on the CID.
18. If the information was sent on 3rd June 2013, it was likely to have been received the following day on 4th June 2013, but in any event by 5th June 2013, but certainly it was received before the decision was actually made. The CID notes, handed up by Mr Walker before this Tribunal, and which were importantly for consideration by Judge Khan before the First-tier Tribunal Judge, do not accurately reflect the position, because they do not refer to the additional documents that are in the bundle at I1 to I4. This is a matter of due process.
19. The Rules are promulgated by the Secretary of State. The guidance notes are formulated by the Secretary of State for the assistance of caseworkers. They are in the public domain. Applicants making their applications as a Tier 1 Entrepreneur have access to them. Ultimately, the issue is one of the Rule of law. Has the Rule of law been followed in this case? It is clear that it has not.
20. If information was despatched and received before the date of the decision, then it is clear that the evidential flexibility policy was not properly and faithfully followed because the injunction is clear to caseworkers that they must take such information into account. What is entered on the CID is quite different from what is the position in reality. As such, it was bound to have led to the wrong decision.

21. Accordingly, I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside that decision. This is because the information enclosed at I1 to I4 has not been taken into account by the caseworker prior to the making of a decision. It should be taken into account. I do not, however, remake the decision.
22. It is not for this Tribunal to make the original decision for the decision-maker on the documents that have not been considered. Accordingly, this matter must be remitted back to the Respondent decision-maker for a fresh decision on the documentation that has been submitted, which needs to be faithfully carried out on the basis of all the evidence that has now been submitted.

Decision

23. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. This appeal is allowed to the extent that it is remitted back to the Respondent authority to remake on the basis of the evidence before that body, and in particular the evidence that has additionally been provided at pages I1 to I4.
24. No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Juss