Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24137/2013

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 5 February 2014	**On: 12 February 2014**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KARUPPIAH VIGNESH KUMAR

Respondent

Representation:

For the Appellant: Mr G Saunders, Senior Home Office Presenting Officer
For the Respondent: Mr G Davison, instructed by Indra Sebastian Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department (SSHD) against the decision of First-tier Tribunal Judge Oliver allowing Mr Kumar's appeal, on limited grounds, against the respondent's decision to refuse leave to remain as a Tier 1 (Entrepreneur) Migrant and to remove him from the United Kingdom by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. For the purposes of this decision, I shall hereafter refer to the Secretary of State as the respondent and Mr Kumar as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of India born on 11 November 1984. He first entered the United Kingdom on 15 September 2009 with leave to enter as a Tier 4 (General Student) Migrant until 30 March 2011. On 4 April 2011 he was granted leave to remain as a Tier 1 (Post Study Work) Migrant until 4 April 2013. On 22 March 2013 he applied for further leave to remain as a Tier 1 (Entrepreneur) Migrant.

4. The appellant's application was refused under paragraph 244DD of the immigration rules on the grounds that he had failed to meet the requirements at paragraph 245DD(b) as he was awarded zero points under Appendix A (Attributes). The respondent considered that he had failed to show that he had access to the required funds. He had failed to provide documentary evidence supporting his claimed business activity in terms of advertising materials, articles, information from a trade fair or registration with a trade body. Furthermore, the contract he had supplied as evidence of trading activity did not show the services he was providing.

5. The appellant appealed against that decision, submitting grounds of appeal that were general in nature. His appeal was heard by First-tier Tribunal Judge Oliver on 25 October 2013. The judge made reference to the appellant's statement in which he had stated that he would have been able to supply the required information to the Home Office had they requested it and that he did have evidence supporting his business activities and the nature of the services he was providing. He also referred to an additional statement from the appellant in which he stated that he had now noticed that the Home Office bundle did not include all the documents submitted with his application. The judge noted that an additional bundle had been adduced which the appellant claimed included the documents submitted with his application. The judge concluded that, despite the inclusion of paragraph 245AA in the immigration rules reflecting the respondent's evidential flexibility policy, the policy itself, which was wider than the rules, was still applicable and had not been considered in the appellant's case. On that basis he found the respondent's decision not to be in accordance with the law and he allowed the appeal on the limited basis that the matter be remitted to the Secretary of State for further consideration. He also found the removal decision not to be in accordance with the law since the appellant's Article 8 claim had not been considered.

6. Permission to appeal to the Upper Tribunal was sought by the respondent on the grounds that the judge had erred by considering that the old evidential flexibility policy applied to the appellant rather than paragraph 245AA of the immigration rules which was in force at the time his application was made; and that in any event the provisions of those rules did not apply to him as the missing information was too wide-ranging. The judge ought to have dismissed the appeal under the rules and gone on to determine the Article 8 claim, noting that no application had been submitted under Appendix FM.

7. Permission to appeal was granted on 16 December 2013.

Appeal hearing

8. The appeal came before me on 5 February 2014. Mr Saunders relied on the Court of Appeal judgment in Secretary of State for the Home Department v Rodriguez [2014] EWCA Civ 2. He submitted that the judge had erred by finding that the policy applied to the appellant rather than paragraph 245AA but that in any case the appellant did not fall within the policy. The wording of the skeleton argument suggested that the documents in the supplementary bundle had not been submitted to the Home Office with the application and the judge made no clear findings on that.

9. Mr Davison accepted that it was not clear which documents were before the Home Office and it was on that basis that the judge correctly referred the matter back to the Secretary of State. Furthermore, since the decision included a removal decision the judge was entitled to refer the matter back to the Secretary of State to consider Article 8 since it had not been considered in the refusal letter. There was no error of law.

Consideration and findings

10. Judge Oliver was clearly in error in his understanding and interpretation of the evidential flexibility policy. Paragraph 245AA had been introduced into the immigration rules at the time the appellant made his application and it was therefore the rules themselves which dictated the relevant requirements, rather than the policy the rules had been introduced to replace. However, even if the policy had survived the introduction of paragraph 245AA, it clearly did not apply in the appellant's circumstances, where the respondent plainly could not have had sufficient reason to believe that the required documentary evidence existed. It is clear from the refusal decision that the appellant's application was significantly deficient in its supporting evidence. The purpose of the policy was not to give the appellant an opportunity to rectify such deficiencies when the rules made it clear what documentary evidence was required. That was indeed the finding made by the Court of Appeal in Rodriguez, at paragraph 92: "Taken overall, the Evidential Flexibility process instruction is demonstrably not designed to give an applicant the opportunity first to remedy *any* defect or inadequacy in the application or supporting documentation so as to save the application from refusal after substantive consideration.". Accordingly the judge's finding that the respondent's decision was not in accordance with the law owing to a failure to consider the policy was manifestly wrong in law and what he ought to have done was to consider the matter himself.

11. It was Mr Davison's submission that the judge properly remitted the matter to the Secretary of State in view of the confusion as to which documents had been submitted with the application. However that was clearly not the basis upon which the judge had remitted the case. In fact he made no clear findings as to which documents had been included with the application and whether or not he accepted the appellant's claim to have sent the documents in the supplementary bundle to the UKBA. Neither did he give any consideration to the question of whether the documents the appellant was claiming to have included with his application would have been sufficient to meet the requirements of the rules in any event. Those were findings that he ought to have made. Indeed, if he had

accepted the appellant's claim that the documents had been included with the application and that those documents did address the deficiencies identified in the refusal letter, there would have been no need for him to remit the matter at all.

12. Accordingly, it seems to me that, in the absence of any findings on the appellant's ability to meet the requirements of the immigration rules, that is still a matter that has to be considered and determined by the First-tier Tribunal.

13. It was Mr Davison's submission that even if that were the case, the judge was still correct to send the matter back to the Secretary of State since no decision had been made on the appellant's Article 8 claim. However it is relevant to note that the appellant had never made an Article 8 claim with his application and that his marriage giving rise to that claim took place after his application had been considered and refused. There was therefore nothing before the Secretary of State to consider in terms of Article 8. The appellant did not submit a separate Statement of Additional Grounds, as the refusal decision advised him to do if he had further reasons for believing that he should be allowed to stay in the United Kingdom, but reference was simply made, in the relevant section in his Notice of Appeal, to the general grounds. In any event the Notice of Appeal was lodged prior to his marriage and no reference was made in the grounds to an impending marriage due to take place a few days later. Indeed the grounds were extremely vague and, whilst making a brief reference to Article 8, provided no basis upon which such a claim could be made out. It is also relevant to note that the appellant has still made no application under Appendix FM. In the circumstances I see no reason why Judge Oliver ought not to have considered the appellant's Article 8 claim himself and, again, in the absence of any findings in that regard it seems to me that this is a matter that has to go back to the First-tier Tribunal.

14. For all of these reasons, I find that the decision of the First-tier Tribunal contains errors of law and has to be set aside. In the circumstances, it is appropriate for the appeal to be remitted to the First-tier Tribunal for all matters to be determined.

DECISION

15. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), before any judge aside from Judge Oliver.

Signed Date

Upper Tribunal Judge Kebede