Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24698/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6th May 2014	**On 25th June 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR A K M BORHAN UDDIN KHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Hossain (Counsel)
For the Respondent: Ms Alex Everett (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge L. Murray, promulgated on 21st January 2014, following a hearing at Columbus House,

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Newport, on 8th January 2014. In the determination, the judge allowed the appeal of AKM Borhan Uddin Khan, to the extent that it remained outstanding before the Respondent Secretary of State, because the latter had not exercised his discretion under the "evidential flexibility" policy to make enquiries of the Appellant, such as to enable him to reach a proper decision in relation to the Appellant's application.

The Appellant

2. The Appellant's application is for leave to remain as a Tier 1 (Entrepreneur) Migrant. He made the application on 31st January 2013. The application fell to be determined under paragraph 245DD of HC 395. On 4th June 2013, the Respondent Secretary of State rejected that application on the basis that the information required by the Immigration Rules had not been provided. The Appellant, who is a Bangladeshi national, born on 1st July 1982, appealed against that decision.

The Judge's Findings

3. The judge heard evidence that the Appellant had access to £50,000 and intended to invest the money in the UK. He was the director and sole owner of his company. There were deficiencies with respect to the availability of a contract but "the contract was not a vital document" (paragraph 8). Furthermore, "the advertising material was also available to the Appellant but he did not know it was required as part of his application". In these circumstances, if there was any deficiency the Respondent Secretary of State could apply the "evidential flexibility" policy and make enquiries.

4. At the hearing, Mr Muquit, who represented the Appellant, stated in his skeleton argument, that "the evidence which was missing from the application was the marketing material which was now present" (paragraph 11). Therefore, it was being suggested that, "on the face of it there was sufficient evidence for the Respondent to investigate to see whether the company was advertising itself" (paragraph 12).

5. The judge concluded that,

> "The Appellant did not submit advertising material with the application as required by paragraph 410SB(e)(iii) and I do not accept Mr Muquit's submission that by providing evidence of his company's registration at Companies House the Appellant satisfied the requirement by providing 'personal registration with a trade body linked to the applicant's occupation'. However I agree that the Respondent could have asked for such information" (paragraph 18).

Given these findings, the judge held that, the failure of the judge to make further enquiries, was not in accordance with the law, in the light of the "evidential flexibility" policy, and the application remained outstanding before the Respondent (paragraph 20). The appeal was allowed to that extent.

Grounds of Application

6. The grounds of application state that the judge erred by allowing the appeal under the policy of evidential flexibility because the plain fact was that the Appellant had not provided the required advertising material, which was a requirement of the Immigration Rules, and therefore any further consideration would have been speculative. Moreover, there were insufficient reasons to believe that the documents actually existed. The judge had not explained why the Respondent might have believed that the missing documents actually existed.

7. On 2nd April 2014, permission to appeal was granted.

Submissions

8. Appearing before me, Mr Hossain, of Counsel, represented the Appellant on 6th May 2014. He was double-booked and therefore was unable to commence with this appeal until he had been released from court in the other hearing. This was not an ideal way in which to provide representation before these Tribunals and I indicated to Mr Hossain that care should be taken to avoid this in the future. Ms A. Everett who appeared for the Respondent Secretary of State, explained that the core problem lay in the fact that the judge does not provide reasons for concluding that the current director appointment report from Companies House, was provided by the Appellant, in circumstances where the Respondent stated that it had not (see paragraph 17). This report was not in the file. It was still not there. If it was the Appellant's case that it had been provided, it was open to Mr Hossain to now explain where it was. It simply was not there.

9. For his part, Mr Hossain submitted that he would deal with the question of the advertising material. He would do so by explaining that there was no provision in the application form that dealt with the advertising material, although it was accepted that this was a requirement under the Immigration Rules, and the fact that this was prone to cause an injustice, was recognised by the fact that the form had since then been amended.

10. Given this, this was exactly the sort of situation where the evidential flexibility policy should have been applied by the Secretary of State. It is true that the case of **Rodriguez (Flexibility Policy) [2013] UKUT 00042**, saw the Court of Appeal restrict the application of the "eventual flexibility" policy, but this was much later, and it was not a decision that applied to the judge when he made his decision. Ultimately the Secretary of State had to act fairly in exercising her discretion: see **Ukus (discretion: when reviewable) [2012] UKUT 00307 (IAC).**

11. In reply, Ms Everett submitted that the plain fact was that the Appellant could not succeed under the Immigration Rules and there was no suggestion that paragraph 245AA did not apply. The Court of Appeal in **Rodriguez** did not say that paragraph

245 is not to be applied. I should make a finding of an error of law and remake the decision.

Error of Law

12. 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 and remake the decision. My reasons are as follows.

13. First, the requirement of advertising material for the purposes of marketing appears in the Immigration Rules at paragraph 245. It is true that it was not specifically mentioned in the form at the time that the Appellant completed his form. Nevertheless, the Rules require such information. It was not provided. The application was therefore not made in accordance with the Immigration Rules.

14. Second, the judge heard submissions from Mr Muquit, who then represented the Appellant. The judge only said that "Mr Muquit in his skeleton argument... added that the evidence which was missing from the application was the marketing material which was now present" (paragraph 11). However, it is not clear whether this statement was ever made good in any way. Certainly, it was not before this Tribunal. In any event, it did not comply with the Immigration Rules.

15. Third, the judge also concluded that the Appellant had provided the current director appointment report from Companies House. The Respondent Secretary of State had argued that it was not provided. The Appellant stated that he did provide this with his application and that the copy is attached to page 6 of his bundle. It was still not there. Ms Everett, appearing on behalf of the Appellant, stated in her submissions before me today, that there may well be an explanation, if this documentation had been provided but was not there, which could be put before this Tribunal. If so this could be done. Mr Hossain did not provide any such explanation. Therefore, the position remains the same, namely, that at paragraph 17, in concluding that such information had been provided, the judge failed to give reasons. He failed to say that he had himself seen this information at page 6 of the bundle.

16. Finally, the judge relied upon the "evidential flexibility" policy to state, in these circumstances, that the application remained outstanding. In short, this amounted to an error of law.

Remaking the Decision

17. I have remade the decision on the basis of the findings before the original judge, the evidence before him, and the submissions that I have heard today. I am dismissing this appeal for the following reasons.

18. First, the requirement under the Immigration Rules was for the marketing material to be provided. It was not provided. The application was therefore not in accordance with the Rules.

19. Second, the evidential flexibility policy does not extend to the extent of requiring the Secretary of State to make enquiries about outstanding material, such as the marketing material, which is clearly a requirement of the Rules.

20. Third, there is no evidence that this material was presented before the original judge (as submitted in the skeleton argument of Mr Muquit: see paragraph 11). For all these reasons, this appeal falls to be dismissed.

Decision

21. 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. I remake the decision as follows. This appeal is dismissed.

22. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 24th June 2014