Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24934/2013
IA/24952/2013

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
on 27th February 2014	**On 10th April 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RABINDER KUMAR HIRAWAT
PRIYANKA BARARIA
(Anonymity direction not made)

Respondent

Representation:

For the Appellant: Mr Richards – Senior Home Office Presenting Officer.
For the Respondent: Mr Chowdhury of ACM Immigration Experts LTD.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Creswell promulgated on 25th November 2013 in which he allowed the Appellants' appeals on the basis the decision was not in accordance with the law and that the application awaits a lawful decision.

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2. Mr Hirawat is a citizen of India born on 18th July 1984. His wife Priyanka Bararia, also a citizen of India, was born on 23rd December 1983.

3. Mr Hirawat's immigration history shows that on 14th September 2006 he was granted leave to enter the United Kingdom as a student. His leave was varied as a student until 31st October 2008, as a Tier 1 (Post Study Work) Migrant from 24th January 2009 to 8th January 2011 and from 15th April 2011 as a Tier 1 (General) Migrant valid until 15th April 2013. On 18th March 2013 he applied for further leave to remain as a Tier 1 (General) Migrant which was refused on 3rd May 2013.

4. Mrs Bararia was granted leave to enter the United Kingdom as a Tier 1 (General) Dependent on 24th September 2011 valid until 15th April 2013. On 18th March 2013 she too made an application for leave to remain but as a partner of a Tier 1 Migrant which was refused in line with that of her husband.

5. Mr Hirawat's application was refused on the basis of his previous earnings. He claimed 20 points under paragraph 245CA(b) and Appendix A of the Immigration Rules. In support of his claim he provided payslips from Lloyds TSB Group PLC and from First Source Solutions Ltd which were considered by the decision maker. It was noted that the Lloyds Group PLC payslips started on 20th January 2012 and ended on 18th January 2013 and therefore record thirteen months pay whereas the provisions of the Rules only enable the decision maker to consider whether the required minimum level of earnings had been acquired over twelve months. The First Source Solutions Ltd payslips start on 20th January 2012 and end on 31st December 2012 but the decision maker was unable to consider the January 2012 payslip as, again, they will be considering thirteen months earnings and not the stipulated twelve months.

6. Judge Creswell noted that the period of assessment of earnings contained within the Immigration Rules is that of twelve months and not the period for which the wages were paid. This is legally correct as it is the period over which the earnings are earned and not when the wages are received. An applicant is required to establish by the production of admissible documents that the required level of previous earnings has been met based upon a twelve month period of assessment of earnings.

7. By the date of the hearing Mr Hirawat was able to show that he had sufficient income during the relevant twelve month period when his income from self-employment that he undertook was also taken into account albeit that he did not prove he could do so when he submitted his application, as he failed to disclose this additional source of earnings. His explanation for not providing such details to the case

worker was that he had made a mistake in calculating his income from wages and did not think he would need to add in his self-employed income.

8. It was submitted before Judge Creswell that had the Respondent, when identifying that thirteen rather than twelve payslips had been sent, made a simple enquiry Mr Hirawat would have provided details of his self-employed income which would have filled the gap in his earnings. It was submitted this would have, in any event, given him a chance to remedy his mistake.

9. In paragraphs 15 (v) to (vii) of his determination Judge Creswell set out his core findings upon which the decision he made was based in the following terms:

(v) I agree with Mr Chowdhury that the policy of fairness, evident from Rodriguez, is wider than the context of Rule 245AA, which is a statement of what the Respondent might do, not of all that she should do. "The rules are not be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy: Mahad (Ethiopia) v ECO [2009] UKSC 16, Lord Brown as para 10"

(vi) Mr Kirwan ought to have been given the opportunity to realise his mathematical error and submit his evidence of income from self- employment. It would be a rather sad day if decent hard-working people were to be removed from the country simply because they made a mistake with their maths, when a single letter to them could have remedied the situation.

(vii) Because the Respondent did not act in accordance with her policy and the public law duty detailed in Rodriguez, the Appellants' applications await a lawful decision. The outcome of Mrs Bararia's application continues to depend upon the outcome of that of Mr Hirawat. The removal direction was withdrawn.

10. Permission to Appeal was granted to the Secretary of State whose grounds submitted that the First-tier Judge's decision involved an unlawful application of the evidential flexibility policy. The policy referred to in Rodriguez and cited by Mr Chowdhury before the First-tier Tribunal was not relevant to the Secretary of States policy at the date of decision as it had been withdrawn on 13th March 2013. In considering a policy that had been withdrawn the Judge made a legal error. The Grounds also assert that having failed to apply the right

policy the Judge then gave no lawful reason to explain how the Secretary of State could have "sufficient reason" to know that Mr Hirawat had a separate self-employed income when it had not been disclosed on the application.

Discussion

11. It was not in dispute that Mr Hirawat was unable to demonstrate that he had the required minimum level of previous earnings on the basis of the documents he chose to disclose. The Judge was right not to accept the income disclosed in the payslips provided as the first of those payslips, which is dated at the start of the relevant twelve month period, records income earned in the previous month. Had all the income contained in the wage slips been considered, that would have been for a thirteen month period which is outside the period specified in the Immigration Rules as found in Appendix A.

12. Paragraph 20 of Appendix A states that applicants should indicate in the application form for which 12-month period their earnings should be assessed. Paragraph 21 states that for all applicants the period for assessment of earnings must (i) consist of no more than 12 months which must run consecutively, and
(ii) fall within the 15 months immediately preceding the application. Mr Hirawat specified the period 20th January 2012 to 19th January 2013.

13. Mr Chowdhury referred the Judge to the case of Rodriguez and the evidential flexibility considered by the Tribunal in that case although I find no merit in such an “evidential flexibility” argument. The policy for applications under the points based system was incorporated into the Rules at paragraph 245AA on 6th September 2012 which states:

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 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 subparagraph (b).

(b) If the applicant has submitted specified documents in which:

(i) Some of the documents in a 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; or

(iv) A document does not contain all of the specified information;

the Entry Clearance Officer, Immigration Officer or the Secretary of State may contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received at the address specified in the request within 7 working days of the date of the request.

(c) Documents will not be requested where a specified document has not been submitted (for example an English language certificate is missing), or where the Entry Clearance Officer, Immigration Officer or the Secretary of State does not anticipate that addressing the omission or error referred to in subparagraph (b) will lead to a grant because the application will be refused for other reasons.

(d) If the applicant has submitted a specified document:

(i) in the wrong format; or

(ii) which is a copy and not an original document; or

(iii) which does not contain all of the specified information, but the missing information is verifiable from:

(1) other documents submitted with the application,

(2) the website of the organisation which issued the document, or

(3) the website of the appropriate regulatory body;

the application may be granted exceptionally, providing the Entry Clearance Officer, Immigration Officer or the Secretary of State is satisfied that the specified documents are genuine and the applicant meets all the other requirements. The Entry Clearance Officer, Immigration Officer or the Secretary of State reserves the right to request the specified original documents in the correct format in all cases where (b) applies, and to refuse applications if these documents are not provided as set out in (b).

14. A 'specified' document which is in the wrong format (e.g. a letter is not on headed notepaper, as specified), or is a copy rather than the original, or does not contain all the specified information, can trigger a request for the correct version of the document. A 'missing' document can only be requested if it is one of a sequence, e.g. one bank statement from a series has been omitted, but not if it is the sole "specified" document. A condition of the above policy is an instruction to decision makers that before they seek further information from the applicant they must have established that the evidence exists or have sufficient reason to believe the information exists.

15. The case of Rodriguez (Flexibility Policy) [2013] UKUT 00042 (IAC) was overturned by the Court of Appeal in SSHD v Rodriguez and Others [2014] EWCA Civ 2 in which it was held that the Secretary of State for the Home Department had not been under any obligation to afford applicants for leave to remain as Tier 4 (General) Student Migrants in the United Kingdom any opportunity to remedy defects in their applications in relation to maintenance funding requirements under her evidential flexibility policy. The evidential flexibility policy was not designed to give an applicant the opportunity first to remedy any defect or inadequacy in an application or supporting documentation so as to save the application from refusal after consideration (my emphasis).

16. In R(on the application of Kaur) v SSHD [2013] EWHC 1538 it was held that where the procedure involved the submission by an appellant of documents for whose selection he or she was responsible, the respondent was not required to communicate doubts about a document to the appellant or give the appellant further opportunity to supply documentation or explanations.

17. In light of the above I find it not proved that there was any legally binding obligation upon the Secretary of State to refer to Mr Hirawat to invite him to remedy defects in documents that he had submitted and that he has sought to rely upon. The common-law principle of fairness does not impose such an obligation and nor do the specific provisions of 245AA of the Immigration Rules. There is no arguable basis on which the Secretary of State could be expected to have been aware of undisclosed sources of income. As a result it is arguable that the First-tier Tribunal Judge who allowed the appeal on the basis the decision was not in accordance with the law as a result of failure to apply the correct policy, based upon an evidential flexibility argument, has legally erred in a manner material to his decision to allow the appeal to the extent it is remitted to the Secretary of State.

18. I set aside the decision. The findings in relation to the immigration history, the documentation submitted with the application, the fact

that insufficient evidence of the required minimum level of previous earnings had been disclosed, and the findings in relation to the payslips submitted, shall all be preserved findings.

19. In relation to re-making the decision; I find that at the date of the application or decision it has not been established that Mr Hirawat was able to meet the requirements of the Immigration Rules and undisclosed documents which may have enabled him to correct errors that were made in his application do not now enable him to succeed. Accordingly his appeal is dismissed as is that of his wife in line.

Decision

20. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. These appeals are dismissed.**

Anonymity.

21. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such direction.

Signed…….
Upper Tribunal Judge Hanson

Dated the 10th April 2014