



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/33323/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 4 June 2014

Determination Promulgated  
On 12 June 2014

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

MR FAIZUL ISLAM BHUIYAN  
(Anonymity Direction Not Made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr F Junior a legal representative from UK Immigration Consultants

For the Respondent: Mr E Tufan a Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant is a citizen of Bangladesh who was born on 1 July 1978. He has been given permission to appeal the determination of First-Tier Tribunal Judge Herlihy ("the FTTJ") who dismissed his appeal against the respondent's decision of 23 May 2013 to refuse to vary his leave to remain in the UK as a Tier 1 (Entrepreneur) Migrant. The appellant had made a joint application with Mr Syed Abu Asad. Together I will refer to the appellant and Mr Asad as the applicants.

2. The respondent refused the application because she was not satisfied that the documents which had been submitted by the applicants met the requirements of the Immigration Rules. The appellant was not entitled to 25 points for access to funds under paragraph 245DD (b) because of three defects. Firstly, the letter from the third party was not valid because it was not signed by the applicants. Secondly, the Notarised Certificate submitted from the third parties legal representative did not give details of the registration authority for him to practice legally in Bangladesh. Thirdly, the letter from Citibank Limited did not include the third-party's telephone number or email address. The respondent also concluded that Mr Asad was not entitled to 10 points for funds under Appendix C because the Barclays bank statements which he had submitted did not demonstrate that he held the required funds for the required period. For part of that period the amount fell below the £900 threshold.
3. The claimants appealed and the FTTJ heard their appeals on 24 February 2014. Both sides were represented, the claimants by Mr Junior who appears before me. The FTTJ found that the documents submitted by the claimants did suffer from the defects alleged by the respondent and did not meet the requirements of the Immigration Rules. The FTTJ went on to consider whether there were evidential flexibility requirements which the respondent should have applied. She concluded that there were evidential flexibility provisions but they were not met. In relation to Mr Asad, it was found that he did not meet the requirements because for some of the required period he did not have the necessary amount in his bank account. The FTTJ dismissed the appeals of both claimants under the Immigration Rules and on Article 8 human rights grounds although it appears that these had not been pursued.
4. The claimants sought permission to appeal to the Upper Tribunal. Permission was granted in respect of the appellant had not Mr Asad. Mr Asad's application for permission to appeal has not been renewed and in the circumstances the only appeal before me is that of the current appellant, Mr Bhuiyan.
5. It is not clear from the determination exactly what evidential flexibility policy was put before the FTTJ. Paragraph 6.4 refers to the case of Rodriguez (Flexibility Policy) [2013] UKUT 00042 (IAC). In paragraph 6.5 there is reference to; "I have considered the respondent's policy which the appellants' representatives now seeks to rely on..."
6. Mr Tufan now submits two extracts from the archived Immigration Rules, one which was correct at 3 October 2012 and the other at 30 October 2012. They are identical. He has been unable to find an archived version at the precise date of the application by the claimants which was 18 October 2012. He contends that these extracts contain paragraph 245AA which was the Immigration Rule applicable to this application and appeal replacing the respondent's earlier evidential flexibility policy outside the Immigration Rules. I had armed myself

with the tracked changes in the Immigration Rules which indicate that paragraph 245AA contained in the extracts produced by Mr Tufan was the provision in force both at the time of the application and the decision. Paragraph 245AA in this form was deleted with effect from 1 October 2013 and a changed version inserted. I will need to make further reference to this.

7. Both representatives agreed and I find that the relevant evidential flexibility provisions are those contained in the version of paragraph 245AA produced by Mr Tufan. These are;

“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 UK Border Agency will only consider documents that have been submitted with the application, and will only consider documents submitted after the application where subparagraph (b) applies.

- (b) The subparagraph applies if the applicant has submitted:

- (i) A sequence of documents and 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; or

- (iii) A document that is a copy and not an original document, the UK Border Agency will contact the applicant or his representative in writing, and request the correct documents. The requested documents must be received by the UK Border Agency at the address specified in the request within seven working days of the date of the request.

- (c) the UK Border Agency will not request documents where a specified document has not been submitted (for example an English language certificate is missing), or where the UK Border Agency does not anticipate that addressing the omission or error referred to in subparagraph (b) would lead to grant because the application will be refused for other reasons.”

8. I note that the version of paragraph 245AA which came into effect on 1 October 2013 and is now in force differs in a number of respects from the version set out above. It provides;

“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)."

9. Mr Junior relied on the appellant's grounds of appeal to the Upper Tribunal. However, these grounds rely on the current version of paragraph 245AA of the Immigration Rules not the earlier version which he now accepts is the applicable version. He applied to amend the grounds of appeal to reflect the correct version of paragraph 245AA. Mr Tufan objected but I allowed the application. I do not consider that Mr Tufan, who produced the correct version of the Rule, was in any way disadvantaged or taken by surprise.
10. Mr Junior admitted that the three documents in question were, in their original form, defective for the reasons given by the respondent. However, he took me to the amended versions of these documents which were before the FTTJ which, he argued, remedied all the defects. He submitted that the defects in the documents came within "(ii) a document in the wrong format" and that the respondent should have informed the appellant or his representatives and given them the opportunity to rectify these defects. In failing to refer to or apply paragraph 245AA the FTTJ erred in law. The correct decision would have been to conclude that the respondent's decision was not in accordance with the law and to remit the application to her for reconsideration.
11. In relation to the point raised in the Rule 24 reply Mr Junior submitted that there was nothing in the documentation to indicate that the sponsor's funds were only available to both the applicants. The appellant's contention was that they were available to him even if his business partner was not given leave. He accepted that paragraph 245AA did not assist Mr Asad because the ground for refusal affecting only him related to a missing document not covered by this provision. In reply to my question he contended that "a document in the wrong format" encompassed "required information".
12. Mr Tufan submitted that the defects in the documents were not covered by; "a document in the wrong format". In reply to my question, he indicated that he was not aware of any judicial authority as to what was covered by "the wrong format". Furthermore, the evidence did not indicate that the funds would be available to the appellant if Mr Asad was not able to continue with his business partner because he did not have leave to remain in the UK. I was asked to find that the FTTJ had not erred in law and to uphold the determination.
13. Mr Junior informed me that he had been instructed that Mr Asad was making a fresh application on the same basis as before accompanied by the correct documents. I reserved my determination.

14. I find that the FTTJ erred in law. She should have applied the evidential flexibility policy contained in paragraph 245AA of the Immigration Rules rather than, as she appears to have done, the policy outside the rules referred to in Rodriguez. Having found that there is an error of law I set aside the decision which I now remake. Mr Junior accepted and I find that no further evidence or submissions are required.
15. Mr Junior accepts and I find that the three documents with which the respondent found fault, submitted with the original application, did not meet the requirements of the Immigration Rules. However, he submits that the amended versions of the same three documents which were before the FTTJ did meet these requirements. I have studied these documents carefully and compared them with the earlier defective versions. Mr Tufan did not dispute and I find that the documents before the FTTJ do meet the requirements of the Rules. This brings me to the question whether the respondent should have applied paragraph 245AA and considered documents which had not been submitted with the application.
16. Paragraph 245AA in the form which I have set out, in force at the relevant time, lacks clarity in a number of ways. It may be, although I have no evidence about this, that this is why the paragraph was amended to the form in which it now appears. Whilst subparagraph (c) refers to the UK Border Agency requesting documents it is not clear how this should be done or whether there are any and if so what time limits for supplying documents which have been requested. It is not clear what is meant by "a document in the wrong format". The current version is clearer. It includes at (b) (ii) "a document in the wrong format (for example, if a letter is not on letterhead paper as specified)" and "(b) (iv) a document does not contain all of the specified information". I consider that "format" normally means the way in which something, in this case a document, is arranged or presented. I can see no reason why presentation should not include elements of content. Considering the version in force at the relevant time both in isolation and in the light of the version now in force I find that there is ambiguity and that ambiguity should be construed against the respondent who, through Mr Tufan, submits that I should apply a restrictive interpretation. In this context I find that "the wrong format" encompasses the differences between the documents originally submitted by the appellant and those which I now find to meet the requirements of the Rules. Furthermore, looking at the corrected versions and comparing them with those originally submitted I find that the addition of the missing words has meant that the format has changed.
17. Whilst the appellant and Mr Asad made applications which indicated that they wished to be entrepreneurs in business together I can find nothing in the documentation including the funding declaration from Mr Islam which indicates that the appellant would not or could not continue in business if Mr Asad was unable to join him or that in these circumstances the funding would not be provided.

18. I find that the respondent should have applied the provisions of paragraph 245AA of the Immigration Rules and that had she done so the appellant would have provided the amended documentation which meets the requirements of the Rules. In the circumstances it is not necessary or appropriate for me to find that the respondent erred in law or to send the application back to her for further consideration. I am not dealing with the application of a discretionary policy but the application of an Immigration Rule.

19. Having set aside the decision of the FTTJ I remake it by allowing the appellant's appeal under the Immigration Rules.

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Signed  
Upper Tribunal Judge Moulden

Date 5 June 2014