



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

Appeal Number: IA/02596/2013

THE IMMIGRATION ACTS

**Heard at Bradford
On 28th August 2013**

**Determination Promulgated
On 29th August 2013**

Before

DEPUTY UPPER TRIBUNAL JUDGE HEMINGWAY

Between

**HASSAN ULLAH KHAN JADOON
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In Person
For the Respondent: Mrs R Pettersen (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellant, a national of Pakistan who was born on 30th March 1987, has appealed to the Upper Tribunal in respect of a determination of the First-tier Tribunal (Judge Fisher), promulgated on 8th April 2013, dismissing his appeal against the Respondent's decision of 7th January 2013 refusing to vary leave to remain as a Tier 1 (Entrepreneur) Migrant and deciding to remove him from the UK pursuant to section 47 of the Immigration Asylum and Nationality Act 2006.

2. Anonymity was not sought and there does not appear to be any reason to make such a direction. Judge Fisher did not make such a direction. I do not do so.
3. The Respondent had refused the application on the grounds that the Appellant had failed to show that he met various requirements contained in Appendix A and Appendix C of the Immigration Rules.
4. As to Appendix A, the Judge concluded that mandatory requirements were not met in that letters written by the NIB bank which had been tendered to show the availability of business funding were not dated; the letters did not contain the Appellant's name; they post dated the application and a declaration produced by a third party did not contain the Appellant's signature. As to Appendix C, the Judge concluded that the credit balance in a bank statement submitted by the Appellant with respect to the maintenance requirements was £57 below the required amount on one day during the assessment period.
5. The Judge considered the possible impact of the decision in **Rodriguez (Flexibility Policy) 2013 UKUT 42 (IAC)** and concluded if he had been concerned with Appendix C only he would have been minded to allow the appeal on the basis that under the evidential flexibility policy addressed in **Rodriguez** the Respondent could have contacted the Appellant to see if he could "plug the gap" and it appeared he could have done so by providing a statement from a different financial institution. However, **Rodriguez** and the policy would not assist with respect to Appendix A because "the evidential flexibility policy was not intended to cater for those situations where the documents produced by an applicant simply did not meet the requirements of the Rules".
6. In light of the above the Judge dismissed the appeal, with respect to variation of leave, under the Rules. He did, though, allow it to a limited extent with respect to the removal aspect of the decision, on the basis that it is was, at the time, unlawful to take a variation and section 47 removal decision together. As to article 8 of the ECHR the Judge said this could not be relied upon now that there was no immediate risk of removal and noted that the Appellant's then representative accepted that to be the case.
7. Although he was represented before Judge Fisher, it appears the Appellant, who is no longer represented, has drafted the application for permission to appeal to the Upper Tribunal himself. He refers to the evidential flexibility policy and appears to suggest consideration should have been given to post application evidence.
8. On 16th May 2013 Judge Pedro granted permission to appeal. This is because it was thought Judge Fisher may have erred in failing to consider post application evidence in light of the decision in **Khatel 2013 UKUT 00044 (IAC)**.
9. In light of the grant, the Respondent filed a "rule 24 response" contending that the Judge had directed himself properly save for concluding that article 8 could not apply absent the threat of removal. However, it was contended this was not a material error because any article 8 arguments were bound to fail.

10. Before me the Appellant said that some documents which he had sought to rely upon with his application for variation had been lost in the post. He had to ask for them to be sent to him again. He wants to start a business.
11. Mrs Petersen submitted that the Judge's reasoning had been sound as to both variation and removal. As to article 8 no points appeared to have been taken in the grounds of appeal to the First-tier.
12. The Respondent has what is referred to as an evidential flexibility policy. A copy of the policy in the form it was in when the decision in **Rodriguez** was made is attached to the case report. Mrs Petersen tells me it had not changed substantially by the date of the decision upon the Appellant's application. It is clear the policy is designed to deal with instances where evidence missing from an application might be obtained so as to plug a gap, to borrow from the way in which Judge Fisher puts it. I am satisfied, though, that Judge Fisher is correct when he says, in paragraph 10 and 11 of the determination, that a number of mandatory requirements were not met with respect to Appendix A, as noted above, and that these do not fall within the scope of the policy. I note the partial explanation that some documents reached the Appellant late but that does not assist him because it does not deal with all the problems identified by the Respondent and the Judge and does not, in any event, impact upon the requirement that mandatory evidence is required with the application.
13. As to the **Khatel** point this is a reference to the Tribunal's view, as encompassed in that decision, that the application is a continuing one until a decision is made so that further evidence may be provided at any point between application and decision. However, that has now been overturned by the Court of Appeal in **Raju 2013 EWCA Civ 754** and that judgement represents a statement of the law as it always was.
14. Of course, it was the **Khatel** point which led to permission to appeal being granted.
15. As to the removal aspect no challenge has been made as to the Judge's decision to allow the appeal against removal to the limited extent referred to above.
16. As to article 8, it seems to me the Respondent is correct to say, in the rule 24 response, that article 8 still falls to be considered even where there is no imminent threat of removal. However, here, the Appellant did not raise article 8 in the grounds of appeal despite the person who drafted the order 24 reply seeming to think he did.
17. In any event, it is clear from the determination that the matter was not pursued before the Judge. Further, there was no evidence put before the Judge with respect to article 8 issues. There is, for example, no reference to such matters in the Appellant's witness statement of 14th March 2013.
18. In light of all the above, I conclude the Judge did not make a material error of law. The determination shall stand.

19. As Mrs Pettersen acknowledges, the upshot of the Judge's unchallenged decision as to removal means that the Appellant cannot, as matters stand, be forcibly removed from the UK unless and until a lawful decision as to that is taken.

Decision

The appeal is dismissed.

Signed
Deputy Upper Tribunal Judge Hemingway

Date

TO THE RESPONDENT
FEE AWARD

No fee award is made.

Signed
Deputy Upper Tribunal Judge Hemingway

Date