



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/23747/2013

THE IMMIGRATION ACTS

Heard at Field House
On 31st March 2014

Determination Promulgated
On 15th May 2014

Before

Upper Tribunal Judge Chalkley

Between

UPENDRA ASWASTHI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: M Bhuigan Solicitor's Clerk from Universal Solicitors
For the Respondent: Mr P Mangion, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant was born on 20th July, 1985, and is a citizen of Nepal. He entered the United Kingdom in 2009, with entry clearance as a student. His leave as a student was extended by successive further grants and the status was subsequently switched to that of a Tier 1 (Post-Study Work) Migrant, when he was given leave to remain until 10th March, 2013. He made an application on 1st February, 2013, to remain as a Tier 1 (Entrepreneur) team together with Hari Sankar Kurimineni, an Indian citizen and his application was considered under Part 6A of the Statement of Changes in Immigration Rules HC 395 as amended.

2. On 31st May 2013, the respondent refused his application. It was considered that the appellant had not met the requirements of paragraph 245DD(b) and Appendix A, or those in paragraph 245DD(c) and Appendix B. He was notified with the same letter of a decision to remove him from the United Kingdom pursuant to Section 47 of the Asylum and Nationality Act 2006.

3. The reasons given by the respondent for refusing the appellant's application were as follows.

(1) In respect of access to funds as required the respondent wrote

“You have claimed 25 points for having access to £50,000 under provision (d) of Table 4 of Appendix A of the Immigration Rules. You have provided insufficient evidence to demonstrate that you have access to at least £50,000.”

The reasons for this are detailed in the written refusal letter.

(2) In respect of funds held in a regulated financial institution the reasons given for refusing the claim of 25 points were that

“We have established that you have not demonstrated you are eligible to be awarded points under provision (d) of Table 4 of Appendix A of the Immigration Rules having access to £50,000. As you are not eligible to claim points for a reduced level of funds under provision (d) you are required to demonstrate that you are eligible for points for having access to funds in any other provision in Table 4. As you have not demonstrated by us we are unable to accurately assess this attribute. We have therefore been unable to award points in line with published guidance and Appendix A of the Immigration Rules.”

In respect of the funds for disposal in the United Kingdom the same reasons were given for refusing the claim for 25 points.

(3) In reference to Appendix B (English language) the respondent stated

“You have claimed 10 points for English language under Appendix B of the Immigration Rules on the basis that you are holding a degree that was taught in English and is equivalent to a UK bachelor's degree or above. However in this case you have not provided the specified evidence required to be awarded points for English language therefore you have failed to demonstrate that you meet the requirements to be awarded 10 points for English language under any of the other provisions of Appendix B of the Immigration Rules that apply to Tier 1 Migrants.”

(4) Points were awarded as claimed in respect of Appendix C maintenance.

4. The appellant appealed. His determination was heard by First-tier Tribunal Judge Holmes without an oral hearing. In his determination promulgated on 2nd December, 2013, Judge Holmes refused the appellant's application. He noted that the appellant's witness statement referred to the respondent's evidential flexibility policy and included within the appellant's bundle was a copy of *Rodriguez* [2013] UKUT 00042 (IAC). The judge said that since the amendment introduced in paragraph 245AA of the Immigration Rules were brought into force without transitional provisions and clearly applies to this case, it was not necessary for him to consider the question which the Tribunal in *Rodriguez* did have to decide namely, whether the policy has survived. In doing so he noted that the text of paragraph 245AA as cited by the Tribunal in *Rodriguez* omits the very important sub-paragraphs of (c) and (d).

5. He considered the version of paragraph 245AA relevant to the date of decision and concluded that its incorporation into the Rules was inconsistent with the survival of the policies. He concluded that the appellant had not submitted the document that he was required to submit, but instead a wholly different document. He did not have the original degree certificate available and submitted a letter from the University of Northumbria confirming details of his degree in order to satisfy Appendix B Table 1 requiring that he prove that he has a knowledge of English equivalent to level B1 or above of the Council of Europe's Common European Framework for English language learning. The appellant was required to provide mandatory evidence, but failed to do so. As a result the judge concluded that it was not necessary for him to consider the merits of the appeal with reference to Appendix A.
6. The appellant challenged the decision in lengthy and rather repetitive grounds of appeal and on 24th December last Designated Judge of the First-tier Tribunal Lewis believed that the grounds raised a possible error of law in suggesting that the judge had misunderstood the law concluding at paragraph 16 of his determination that paragraph 245AA of the Immigration Rules had effectively replaced the decision in *Rodriguez (flexible policy)* [2013] UKUT 42 and did not exercise on appeal the discretion which paragraph 245AA conferred.
7. At the hearing before me the appellant's representative confirmed that paragraph 245AA was not relevant so far as the letter from Northumbria University was concerned. He confirmed that there was no error of law in respect of the letter from the university. The appellant was required to supply his evidence and Table 2 provided that there were five different grounds on which 10 points could be awarded, "national of a majority English speaking country", "degree taught in English", "passed an English language test", "met the requirements in a previous grant of leave", and "transitional arrangements".
8. Paragraph 7 of Appendix B provides that 10 points will be awarded for a degree taught in English if the applicant has the relevant level of English language shown in Table 1 and
 - (i) has obtained an academic qualification (not a professional or vocational qualification) which either (1) or (2) these requirements are not an issue in this appeal and
 - (ii) provides the following specified documents to show that he has the qualification:
 - (1) the original certificate or award, or
 - (2) if the applicant is awaiting graduation having successfully completed the qualification or no longer has the certificate and the awarding institution is unable to provide a replacement an academic transcript or original letter in the case of a PhD qualification from the awarding institution on its official headed paper which clearly shows the applicant's name, the name of the awarding institution, the title of the award, confirmation that the qualification has been or will be awarded and the date the certificate will be issued if the appellant has not yet graduated or confirmation that the institution is unable to reissue the original certificate or award.
9. The judge noted that appellant relied on a degree awarded by Northumbria University in 2011. At section S6 of the application form, where the printed options indicate that he might send either of the original degree certificate or an original academic transcript, neither boxes were checked but the appellant had drawn his own box indicating the letter from the university. The letter is dated 14th January, 2013, and is not addressed to anybody in particular. It is signed 'Helen G Prime' programme administrator. It is on the stationery of the university and says "I

would like to confirm that” it then gives the appellant’s name, his date of birth, “was studying full-time with Northumbria University programme master of science and engineering management, 31st January 2009 to 13th January 2013 the student was awarded a master of science in engineering management on 9th February 2013”. The judge found that the appellant had submitted neither an original degree certificate nor an academic transcript. He concluded that the appellant had failed to demonstrate he met the requirements of the Rules.

10. At the relevant date paragraph 245AA of the Rules said this:

“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 which have been submitted with the application, and will only consider documents submitted after the application where they are submitted in accordance with sub-paragraph (b).
- (b) If the application 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 in the wrong format or
 - (iii) a document that is a copy and not an original document the UK Border Agency may 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) will lead to a grant because the application will be refused for other reasons.
- (d) If the applicant has submitted a specific document:
 - (i) in the wrong format; or
 - (ii) that is a copy and not an original document the application may be granted exceptionally providing the UK Border Agency is satisfied that the specified documents are genuine and that the applicant meets all the other requirements. The UK Border Agency 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).”

11. The document set out in order to demonstrate that the appellant was entitled to claim the points under Appendix B was not a document set out in Part A. Table B required either the degree or an academic transcript. The appellant submitted a letter from the university which clearly did not meet the requirements of the Rules.

12. Paragraph 245AA makes it clear that where a document is missing from a sequence of documents or where a document is in the wrong format or where a document is a copy and not the original then the agency may contact the appellant or his representative and request the

correct document. The document submitted by the appellant in lieu of his original degree certificate was not a document that met the requirements of paragraph 245AA(b).

13. The appellant's representative confirmed that there was no error of law in respect of the letter adduced by the appellant from his university. It follows therefore that there is no material error of law in the determination of First-tier Tribunal Judge Holmes because any error that there might be could not possibly have the effect of changing the outcome of the appeal. The appeal falls to be dismissed in any event. I uphold the decision of the First-tier Tribunal Judge. This appeal is dismissed.

Upper Tribunal Judge Chalkley