IAC-FH-AR-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/26130/2013

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision and Reasons Promulgated** |
|---|---|
| **On 4 November 2014** | **On 7 November 2014** |

**Before**

**THE HONOURABLE MRS JUSTICE ANDREWS DBE**
**DEPUTY UPPER TRIBUNAL JUDGE G A BLACK**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MD SHAHADAT HOSSAIN**
**ANONYMITY DIRECTION NOT MADE**

Respondent

**Representation:**

For the Appellant: Mr Nath, Home Office Presenting Officer
For the Respondent: Mr Rahman, solicitor.

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State against a determination by the First-tier Tribunal (Judge Kaler) promulgated on 24 June 2014 allowing an appeal by the appellant, Mr Hossain, against the refusal of his application for leave to remain as a Tier 1 (Entrepreneur). We will refer to Mr

Hossain as “the claimant” and to “the Secretary of State “ who is the appellant, to avoid any confusion of terminology.

2. The claimant was represented before the First-tier Tribunal by his previous legal representatives (both solicitors and Counsel). His application for leave to remain as a Tier 1 (Entrepreneur) had been refused on 10 June 2013 on the grounds that the third party declaration was unsigned contrary to the requirements of paragraph 41-SD(b)(i)(3). In the course of the hearing before the First-tier Tribunal the claimant agreed when it was put to him that neither he nor the relevant third party had signed the declaration.

3. The First-tier Tribunal allowed the appeal on the basis that the Secretary of State should have applied the Home Office evidential flexibility policy. She decided that the omission (if there was one) was a minor matter which, in fairness, the claimant should have been given the opportunity to rectify[10]. Reference was made to **Secretary of State for the Home Department and Rodriguez and Others [2014] EWCA Civ 2[9]**.

4. The flexibility policy is now enshrined in paragraph 245AA(a)(b) of the Rules. As Mr Nath on behalf of the Secretary of State pointed out to us today, the policy is inapplicable and that paragraph does not cover this type of case. It relates to a situation where, for example, a series of documents has been submitted and one in the sequence is obviously missing; or where the documentation is in the wrong format which is obviously capable of remedy. However, it does not apply to a situation where the relevant document has been provided, and there is no deficiency in it, but it has never been signed, and therefore the application is invalid from the very outset.

5. The real difficulty that faced the claimant before the First-tier Tribunal (and indeed before us) is that he had known that the signatures were missing, and had had the opportunity to rectify that omission for over a year, but despite that, when the matter came before the First-tier Tribunal, the appropriate signatures still did not appear on the document. Paragraph 13 of the determination refers to the fact that the third party who was supposed to have attended the hearing to sign the declaration was then in Scotland and would return by the end of the week. The Tribunal was understandably concerned as to why the declaration still remained unsigned a year after the application had been refused, but notwithstanding those concerns she was prepared to allow the claimant’s appeal.

6. This morning, Mr Rahman on behalf of the claimant renewed his application for an adjournment. His firm had only been instructed on 2 October 2014. His client had a colorectal operation, which took place on 13 October. The claimant's current solicitors have not had the opportunity to take instructions from him. In addition they were in difficulties in relation to the documentation because the files remained with his former solicitors and they had left it to the claimant to arrange for the transfer of the files to them. The claimant is still recuperating from his operation. Medical evidence was produced last night in the form of a doctor's certificate demonstrating that he was too unwell to attend the hearing today.

7. Whilst of course we are sympathetic to the fact that the claimant has been ill, it seemed to us that only issue in this appeal turned on a very short point of law. As it was an error of law hearing it was unnecessary for the claimant to attend. Mr Nath very kindly allowed Mr Rahman access to his papers, and we rose for a short time so as to give him an adequate opportunity to consider the matter in the light of those documents so that he could make appropriate submissions to us on the law, but we refused any longer adjournment. This is not a case in which any unfairness is created by the refusal of the adjournment of the hearing beyond today. The point is a short one, and Mr Rahman has had an adequate opportunity to make submissions about it.

8. Mr Rahman submitted that it was clear from the way in which the First-tier Tribunal reasoned in paragraphs 8 to 12 that there had been no error of law and that the deficiency in the documentation had been considered properly in accordance with the principles in **Rodriguez** and the Home Office policy.

9. We conclude that this was not a situation falling within the policy on evidential flexibility, the new rules or following **Rodriguez**. Besides this, it was clear that a very considerable length of time had already been given to the claimant to rectify the situation, in excess of twelve months. For reasons that remained unexplained before the First-tier Tribunal, the third party still had not countersigned the document. The application remained an invalid one. There was no reason to believe that the document would be signed. The policy was not designed to given 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. (**Rodriguez** [92])

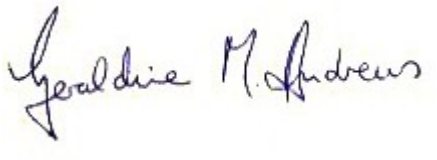
10. We concluded that the Tribunal was wrong to approach the absence of the signatures as a minor error capable of attracting the flexibility policy. There was no unfairness inherent in the

underlying process, and the Home Office was entitled to make the decision that it did.

**Decision**

11. **There was an error of law in the determination such that the decision allowing the appeal under the immigration rules should be set aside.**

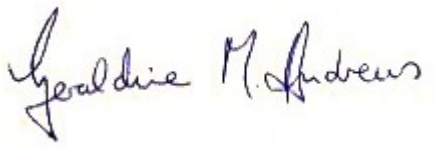
12. **As far as the original appeal is concerned, we remake the decision by dismissing the claimant's appeal on immigration grounds.**



Signed Date 4/11/14

Mrs Justice Andrews

No anonymity order made.
No fee award is payable as the appeal is dismissed.



Signed Date 4/11/14

Mrs Justice Andrews