



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

Appeal Number: IA/26749/2013

THE IMMIGRATION ACTS

**Heard at North Shields
On 19 May 2014**

**Determination Promulgated
On 1 July 2014**

Before

**Deputy Upper Tribunal Judge Pickup
Between**

Secretary of State for the Home Department

Appellant

and

**Hari Krishnan
[No anonymity direction made]**

Claimant

Representation:

For the claimant: Mr A Vaughan, instructed by AK Solicitors LLP
For the respondent: Ms H Rackstraw, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The claimant, Hari Krishnan, date of birth 12.1.84, is a citizen of India.
2. The Secretary of State appealed against the determination of First-tier Tribunal Judge Duff, who allowed the appeal against the decision of the respondent, dated 14.6.13, to refuse to vary leave to remain in the UK as a Tier 1 (Entrepreneur) Migrant. The appeal was allowed on the basis that the decision was not in accordance with the law and breached the appellant's rights under article 8 ECHR. The Judge heard the appeal on 28.10.13.

3. First-tier Tribunal Judge Chohan granted permission to appeal on 17.1.14.
4. Thus the matter came before me on 31.1.14 as an appeal in the Upper Tribunal. I heard submissions and reserved my decision on error of law, which was promulgated to the parties on 18.2.14. I found an error of law in the making of the decision of the First-tier Tribunal such that it should be set aside and remade in its entirety.
5. The remaking of the decision was then listed before me on 19.5.14.
6. At the outset of the hearing before me on 19.5.14, Mr Vaughan sought to reopen the error of law decision. The decision of the First-tier Tribunal having already been set aside, I declined to reopen the error of law decision.
7. The matter was heard with the linked appeal of Mr Abdul Basher Shamin & others, IA/26687/2013. Mr Shamin is the claimant's Tier 1 (entrepreneur) team partner. There were two separate decisions of the First-tier Tribunal and I am asked to draft separate decisions, though the reasoning will largely be the same, as they were in the respective determinations of Judge Duff.
8. For the reasons set out herein, I found that there were a number of errors of law in the making of Judge Duff's decision, such that the determination should be set aside and remade. I attach as an annex to this determination my error of law decision.
9. In summary, I found that the First-tier Tribunal:
 - (a) Wrongly took into account evidence not submitted with the application;
 - (b) Wrongly dispensed with the requirements of paragraph 41-SD in relation to PBS specified evidence; and,
 - (c) Was in error to find that there was an obligation on the Secretary of State to seek missing information as part of an evidential flexibility policy (or under paragraph 245AA);
 - (d) Was in error in the article 8 assessment to consider that the interference with family life was not necessary for the enforcement of immigration policy and misunderstood and misapplied the proportionality balancing exercise;
 - (e) Wrongly applied a near-miss approach to the requirements of the Immigration Rules.
10. I heard submissions from the representatives of both parties, received Mr Vaughan's skeleton argument, and reserved my determination on the remaking of the decision in the appeal, which I now give.
11. Whilst Mr Vaughan represented both the Shamim family claimants and this claimant, Mr Krishnan, the whole of his skeleton argument and most of his submissions related exclusively to the particular circumstances of the Shamim family and in particular the argument that one or both children were entitled to remain in

the UK and thus the parents derived a right to remain under article 8 to care for that child and the other child must also remain with the family.

12. For reasons given in my determination in appeal IA/26687/2013, I have found that the claimants Mr Shamim and his wife and two children failed to demonstrate that they met the requirements of the Immigration Rules for leave to remain as a Tier 1 Entrepreneur and dependents. Their appeals were also dismissed under human rights grounds.
13. Mr Vaughan did not seek to argue that Mr Krishnan met the requirements of the Immigration Rules. However, he submitted that the following factors gave rise to entitlement to remain on the grounds of private life under article 8 ECHR:
 - (a) The length of residence in the UK, since 2008;
 - (b) The time and effort put into setting up, developing and running the business;
 - (c) A positive contribution to the community in establishing two full-time positions for employees of the business;
 - (d) The social and business ties that would be lost in having to leave the UK;
 - (e) A contribution of real value to the community and the country;
 - (f) That his economic contribution in permitting him to remain is greater than the public interest in protecting the economic well-being of the UK by immigration control.
14. Without needing to set out the reasons afresh, it follows from my error of law decision that this claimant did not meet the requirements of the Immigration Rules for leave to remain as a Tier 1 Entrepreneur, as set out at §9 of that decision.
15. In particular he, along with his entrepreneurial team partner failed to comply with the specified evidence requirements of paragraphs 41 and 41-SD of Appendix A of the Immigration Rules.
16. Since the hearing before me, there have been a number of further relevant decisions of the Upper Tribunal in relation to PBS cases.
17. In Durrani (Entrepreneurs: bank letters; evidential flexibility) [2014] UKUT 00295 (IAC), the Upper Tribunal held:
 - (1) The requirements listed in paragraph 41-SD(a)(i) of the Rules are to be construed reasonably and sensibly, in their full context. Approached in this way, the letters required from banks or other financial institutions are not designed to provide, and do not commit them to, any form of guarantee or assurance to any party. Rather, the function of the prescribed letters is to attest to the state of the relevant bank account on the date when they are written and to provide certain other items of information designed to confirm the authenticity of the application for entrepreneurial migrant status and its economic viability. There is no difficulty in the third party bank, with its customer's consent, expressing its

understanding, based on the customer's instructions, that the use of specified funds in the customer's bank account/s is contemplated or proposed by the customer for the purpose of financing the applicant's proposed business venture. Accordingly, there is no substance in the argument that the relevant requirements contained in paragraph 41-SD(a)(i) produce an absurd result and must, therefore, be interpreted in some other manner.

(2) The question of whether a policy exists is one of fact. There is no evidence that some policy on evidential flexibility, independent and freestanding of paragraph 245AA, survived the introduction of that paragraph in the immigration rules.

18. In Akhter and another (paragraph 245AA: wrong format) [2014] UKUT 00297 (IAC), the Upper Tribunal Tribunal held that a bank letter, which does not specify the postal address, landline telephone number and email address of the account holders is not thereby "in the wrong format" for the purposes of paragraph 245AA of the immigration rules (documents not submitted with applications).
19. In relation to the issues in this appeal, it is clear that no flexibility policy survived the introduction of paragraph 245AA and that that limitations of that paragraph cannot be expanded to include defective documents as being in the wrong format. The above case authorities entirely support my error of law decision in relation to the application of evidential flexibility set out between §14 and §33 of that decision.
20. As explained in the error of law decision, under section 85A(4) of the 2022 Act the tribunal can only consider evidence which was submitted in support of and at the time of making the application to which the immigration decision related. Neither paragraph 245AA nor any other evidential flexibility policy could assist the claimant's failure to comply with the specified evidence requirements, or permit the consideration of evidence submitted later. In the circumstances, the application and the appeal have to be considered in the light of the evidence and documents submitted at the time of the application.
21. For the reasons set out in the error of law decision, without needing to repeat them further here, it is clear that the claimant does not meet the requirements of the Immigration Rules for leave to remain as a Tier 1 entrepreneur and his appeal in that regard must fail. Mr Vaughan made no submissions to the contrary.
22. Mr Krishnan makes no claim to having established family life in the UK, only private life. By the operation of the Immigration Rules such private life must be considered under paragraph 276ADE of the Immigration Rules. However, it is obvious, and Mr Vaughan did not argue to the contrary, that the claimant could not meet the requirements of 276ADE. He has not had continuous residence in the UK for a period of 20 years. Neither can he reasonably claim to have no ties to Bangladesh including family, social and cultural.
23. In the circumstances, it must follow that the claimant cannot comply with any of the requirements of the Immigration Rules for leave to remain, either as a Tier 1 Entrepreneur or under paragraph 276ADE.

24. Having found the appellant does not meet the requirements of the Immigration Rules for leave to remain, the question next arises whether the appellant's circumstances might arguably be sufficiently compelling and insufficiently recognised within the Immigration Rules so as to justify granting the application outside the Immigration Rules on the basis of article 8 private life as the decision of the Secretary of State produces a result that is unjustifiably harsh.
25. In MF (Nigeria) v SSHD [2013] EWCA Civ 1192, the Court of Appeal held that in relation to deportation cases the 'new' Immigration Rules are a complete code but involve the application of a proportionality test. Whether that is done within the new rules or outside the new rules as part of the article 8 general law was described as a sterile question, as either way the result should be the same; what matters is that proportionality balancing exercise is required to be carried out. MF (Nigeria) was followed in Kabia (MF: para 398 - "exceptional circumstances") 2013 UKUT 00569 (IAC).
26. In Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640 (IAC) the Upper Tribunal set out, inter alia, that on the current state of the authorities:
- (b) after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin);
 - (c) the term "insurmountable obstacles" in provisions such as Section EX.1 are not obstacles which are impossible to surmount: MF (Article 8 - new rules) Nigeria [2012] UKUT 00393 (IAC); Izuazu (Article 8 - new rules) [2013] UKUT 00045 (IAC); they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: Nagre.
27. The case also explained that the Secretary of State addressed the Article 8 family aspects of the respondent's position through the Rules and the private life aspects through paragraph 276ADE. Only if there were arguably good grounds for granting leave to remain outside the rules was it necessary for him for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules.
28. More recently, in Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC), the Upper Tribunal held:
- (i) Failure on the part of the Secretary of State to identify in her decision any legitimate aim under Article 8(2) of the ECHR does not prevent a court or tribunal from seeking to do so on the basis of the materials before it.
 - (ii) "Maintenance of effective immigration control" whilst not as such a legitimate aim under Article 8(2) of the ECHR can normally be assumed to be either an aspect of "prevention of disorder or crime" or an aspect of "economic well-being of the country" or both.
 - (iii) "[P]revention of disorder or crime" is normally a legitimate aim both in expulsion cases where there has been criminal conduct on the part of the claimant and in expulsion cases where there have only been breaches of immigration law.

- (iv) MF (Nigeria) [2013] EWCA Civ 1192 held that the new immigration rules regarding deportation of a foreign criminal are a complete code. This was because of the express requirement in them at paragraph 398 to have regard to exceptional circumstances and other factors.
 - (v) It follows from this that any other rule which has a similar provision will also constitute a complete code;
 - (vi) Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.
29. Applying the above guidance and case authority, and for the reasons set out herein, I have considered but find no arguably good grounds for granting leave to remain outside the Immigration Rules, or other compelling circumstances, not sufficiently recognised in the Rules so as to justify, exceptionally, granting the application outside the Rules on the basis of article 8 ECHR private life. Neither do I find the decision of the Secretary of State unduly harsh in the circumstances of this case.
30. In Gulshan the Upper Tribunal considered that it was not unduly harsh for a husband who originated from Pakistan but was now a British national, to return to Pakistan with his wife who was seeking leave to remain as his spouse. The panel acknowledged that the couple would suffer some hardship, as he had been in the UK since 2002, he had worked here and was receiving a pension, and housing benefit and other state benefits, some of which could not be transferred to Pakistan. Whilst this claimant's circumstances are different, the decision is illustrative of the Tribunal's view of what does and does not amount to unjustifiably harsh.
31. I take into account all that has been urged upon me in relation to the claimant's business activity and alleged contribution to the community, country and economy. I also take account of his residence here since 2008. However, he has no right or legitimate expectation to remain except in compliance with the Immigration Rules. He is not entitled to remain in the UK just because he wishes to do so. There is a route for being able to remain as an entrepreneur and it was for the claimant to demonstrate on the balance of probabilities that he met the requirements applicable to all applicants who wish to remain as an entrepreneur. As explained in my error of law decision, there is no near miss principle that can assist the claimant; his claim under private life is not strengthened by the degree to which he failed to demonstrate compliance with the Rules. He is not entitled to ask for the requirement to be overlooked or excused in his case. The requirements are deliberately strict and the timetable requires the evidence to be submitted at the time of the application. It follows that the consequences of failure to comply with the requirements are severe, but that does not in any way justify using article 8 private life as a form of shortcut to compliance with the Immigration Rules.
32. Frankly, there is nothing whatsoever compelling about the claimant's private life circumstances. They are unremarkable and no more than one might expect given his length of residence in the UK since 2008. The Immigration Rules provide a separate

route for consideration of leave to remain on the basis of private life. Paragraph 276ADE is the Secretary of State's response to private life rights under article 8. It is deemed that if an applicant has not lived in the UK for a continuous period of 20 years then he will not be entitled to remain on the basis of private life unless he can show that he has no ties to his home country including family, social and cultural. The claimant does not meet those requirements.

33. In the circumstances, taking account of the evidence as a whole, especially those matters urged upon me by Mr Vaughan, I find that there are no compelling circumstances and certainly none insufficiently recognised under the Immigration Rules so as to justify, exceptionally, granting leave to remain outside the Rules under article 8 ECHR on the basis that the decision of the Secretary of State is unjustifiably harsh. I find that it is not unjustifiably harsh on the facts of this case.
34. Even if I had proceeded to a Razgar five-step consideration of article 8 ECHR private life, I would have found that the degree of interference with the claimant's private life was insufficiently grave as to engage article 8. Even if article 8 was so engaged, when considering the proportionality balancing exercise between on the one hand the claimant's private life circumstances and on the other the legitimate aim of protecting the economic well-being of the UK through immigration control, I would have found the decision entirely proportionate for the reasons cited above. The claimant did not meet the requirements of the Immigration Rules for leave to remain when there was a route open to him to seek leave to remain in that capacity. There is nothing remarkable about his private life that would outweigh the public interest in removing him from the UK or would otherwise be disproportionate for any other reason proffered. He will be able to continue his private life in Bangladesh and to maintain contact with the friends and associates he has in the UK through modern means of communication and by occasional visits. There is nothing about that private life which requires his presence in the UK for its continuation.

Decision:

The appeal in respect of the Immigration Rules is dismissed.

The appeal in respect of article 8 ECHR is dismissed.



Signed:

Date: 27 June 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed.



Signed:

Date: 27 June 2014

Deputy Upper Tribunal Judge Pickup



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/26749/2013

THE IMMIGRATION ACTS

Heard at North Shields
On 31 January 2014

Determination Promulgated

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Before

**Deputy Upper Tribunal Judge Pickup
Between**

Secretary of State for the Home Department

and

**Hari Krishnan
[No anonymity direction made]**

Appellant

Claimant

Representation:

For the claimant: Mr R Reynolds, instructed by AK Solicitors LLP
For the respondent: Mr Mangion, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The claimant, Hari Krishnan, date of birth 12.1.84, is a citizen of India.
2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Duff, who allowed the appeal against the decision of the respondent, dated 14.6.13, to refuse to vary leave to remain in the UK as a Tier 1 (Entrepreneur) Migrant. The appeal was allowed on the basis that the decision was not in

accordance with the law and breached the appellant's rights under article 8 ECHR. The Judge heard the appeal on 28.10.13.

3. First-tier Tribunal Judge Chohan granted permission to appeal on 17.1.14.
4. Thus the matter came before me on 31.1.14 as an appeal in the Upper Tribunal.
5. The matter was heard with the linked appeal of Mr Abdul Basher Shamin & others, IA/26687/2013. Mr Shamin is the claimant's Tier 1 (entrepreneur) team partner. There were two separate decisions of the First-tier Tribunal and I am asked to draft separate decisions, though the reasoning will largely be the same, as they were in the respective determinations of Judge Duff.

Error of Law

6. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Duff should be set aside.
7. Following the submissions of the representatives on the issue of error of law, I reserved my decision, which I now give.
8. The relevant background can be summarised as follows. The claimant first entered the UK in 2008 with leave to remain as a student. His leave was subsequently extended as a Tier 1 (Post Study Work) Migrant. On 18.12.12 he made an application for further leave to remain as a Tier 1 (Entrepreneur), along with Mr Shamim. The application was refused on the basis of failure of the appellant to comply with the evidential requirements under Appendix A paragraphs 41-SD and 46-SD. It is the appeal against that decision which came before Judge Duff.
9. The particular failures relied on by the respondent are as follows:
 - (a) Insufficient evidence that the entrepreneurial team had already invested £30,000 into the business 'Fairway Business International Ltd;'
 - (b) The bank letter does not state the claimant's name or that of his entrepreneurial team partner, or that the monies held can be transferred to the UK;
 - (c) The legal representative's letter related to a previous declaration and not the one made with the current application. Further, it did not clearly confirm the third party's identification details or their signature. The letter does not come from a legal representative who is authorised to practice in the country of the third party;
 - (d) Insufficient evidence that the claimant is engaged in business activity. None of the advertisements give the partners names. None of the contracts include a contact telephone number of the clients or original signatures from both parties, or have signatures but pages missing from the contracts;

- (e) No evidence was submitted to demonstrate that that the business is subject to UK taxation.
10. In granting permission to appeal, Judge Chohan noted that the grounds submitted that the First-tier Tribunal Judge wrongly applied the flexibility policy as outlined in Rodriguez (Flexibility Policy) [2013] UKUT 00042 (IAC).
 11. "It is apparent from the judge's determination that the appellant did not meet the requirements of the relevant immigration rules. It is clear from paragraph 15 of the judge's determination that it was accepted by the appellant and his representative that the appellant had failed to supply certain documentation to the respondent. Without going into detail, the judge concluded that the respondent should have given the appellant the benefit of the doubt and requested the missing material. It is concluded that this submission was unfair. The judge then proceeded to allow the appeal under article 8 taking into account the unfairness under the Rodriguez principles. Indeed, it is apparent from paragraph 17 of the determination that the judge considered the appellant's failure to meet the requirements of the immigration rules as, "trivial failures in respect of the immigration rules."
 12. "Considering the determination as a whole I do find that it may be open to argument that the judge wrongly applied the flexibility policy as enunciated in the case of Rodriguez. It follows from that that his findings in respect of article 8 may well be wrong in law. Hence I find that there is an arguable error of law. All grounds may be argued."
 13. For the reasons set out herein, I find that there were a number of errors of law in the making of Judge Duff's decision, such that the determination should be set aside and remade.
 14. Judge Duff noted the evidential failures at §7 of the determination. At §2 the judge recognised that by reason of section 85A of the Nationality, Immigration and Asylum Act 2002 only evidence submitted with the application could be considered in a PBS case. The application was made on 18.12.12 and the refusal decisions followed on 14.6.13. At §11 Judge Duff noted the claimant's reliance on further documentation submitted after the date of application and concluded at §12 and §14 that the Secretary of State had failed to take account of all the evidence submitted, "as it ought to have been." For the reasons set out below, I find that to be an error of law.
 15. As drafted, section 85A provides that when considering a PBS appeal the Tribunal may consider evidence adduced by the appellant only if it was submitted in support of, and at the time of making, the application to which the immigration decision related. Immigration Rule 34G provides that an application is made on the date it is sent or submitted, depending on how it is submitted.
 16. Previous authority suggesting that an application remains open until the date of decision has been overturned. In Raju, Khatel and Others v SSHD [2013] EWCA Civ 754 the Court of Appeal made it clear that AQ (Pakistan) v SSHD [2011] EWCA Civ 833 was, "not authority for the proposition... that applications were "made" throughout the period starting with the date of their submission and finishing with the date of the decisions". Rule 37 of the Immigration Rules governs the date of the

application. Paragraph 34G precludes the concept of a 'continuing application' which started when it was first submitted and concluded at the date of the decision either of the Secretary of State or, on appeal, of a Tribunal.

17. Despite the apparent effect of section 85A, in Nasim and others (Raju: reasons not to follow?) [2013] UKUT 00610(IAC), the Upper Tribunal stated, inter alia,

“ As held in Khatel and others (s85A; effect of continuing application) [2013] UKUT 00044 (IAC), section 85A of the Nationality, Immigration and Asylum Act 2002 precludes a tribunal, in a points-based appeal, from considering evidence as to compliance with points-based Rules, where that evidence was not before the Secretary of State when she took her decision; but the section does not prevent a tribunal from considering evidence that was before the Secretary of State when she took the decision, whether or not that evidence reached her only after the date of application for the purposes of paragraph 34F of the Immigration Rules.”
18. At §76 of Nasim, it is clear that this view was *obiter* and not part of the rationale for the decision. However, it appears from §73 that the respondent's position before the Upper Tribunal was that an application is to be treated as continuing for evidential purposes after it is initially submitted to the SSHD, enabling an applicant to provide further evidence in addition to that initially submitted. There may have been a particular reason for such a concession in that appeal and it may be a matter entirely restricted to that case. However, whilst the respondent could consider evidence submitted after the date of application, the Tribunal cannot as it is clearly prohibited from doing so by 85A(4); I can find no authority to the contrary.
19. Paragraph 245AA was not considered in Nasim, as that case dealt with a different set of criteria for the now-closed post study work route at a time before paragraph 245AA was introduced into the Rules in September 2012.
20. In the circumstances, I find that there was an error of law in Judge Duff taking into account evidence that was before the Secretary of State before she made her decision, and not taken into account by her, as such evidence had not been submitted with the application.
21. Further, at §15 of the determination Judge Duff purports to dispense with the requirements of 41-SD in relation to the advertisements submitted as evidence of engagement in business activity, finding that, “the material taken together satisfied the requirement.” The judge's opinion that it would make no commercial sense for published advertisements to have the claimant's name, or that of his team partner, as opposed to the name of the business is irrelevant. The specific requirement in 41-SD (c)(iii) is that the advertisement must contain, “the applicant's name (and the name of the business if applicable) together with the business activity.” It is not open to the First-tier Tribunal to dispense with the stated requirements; to do so is a clear error of law. I will deal below with the evidential flexibility point made in the alternative in §15.
22. At §16 the judge accepted that none of the contracts had the telephone numbers of the clients on them. At §17 the judge notes that the claimant accepts failing to provide the required evidence of tax registration. At §19 Judge Duff finds that because of these two evidential failures, described as “minor aspects of the rules,” the

appeal cannot be allowed on the basis that the application was not in accordance with the Immigration Rules. However, he proceeded to allow the appeal on the basis that the decisions were not in accordance with the law on the following basis set out in the determination at §17 and §19:

23. That the evidential failures, “ought to have prompted the Secretary of State to make an enquiry of the claimant pursuant to the evidential flexibility policy in existence at that time... A caseworker considering the case clearly ought to have had sufficient reason to believe that the missing piece of evidence existed or at the least to have been uncertain as to whether it existed and to have given the benefit of the doubt to the (claimant) and requested the missing material.”
24. For the reasons set out below, I find that Judge Duff made an error of law in reliance on evidential flexibility to allow the appeals.
25. In relation to the evidential flexibility policy, in Alam and others [2012] EWCA Civ 960 the Court of Appeal held that the exclusion of new evidence introduced by the Nationality, Immigration and Asylum Act 2002 s.85A applied to all appeals made after the date that section 85A was brought into force. The Court accepted the Respondent's contention that the check as to the validity of applications was a very preliminary check to see whether there were obvious omissions: e.g. no fee paid, no photograph supplied, no signature on the Student Declaration at the end of the form. The Court of Appeal accepted the distinction between an invalid application, which would not be considered unless the obvious defect was cured, and an application that was a valid application, but nevertheless fell to be rejected because, on examination, the applicant had failed to score that required number of points, e.g. because he had failed to supply a specified document. In the circumstances, irrespective of any argument as to whether submitted documents were in the wrong format, the failure to provide a specified document, including in this case the contracts, advertisements and tax registration, were omissions fatal to the application.
26. Judge Duff relied on Rodriguez (Flexibility Policy) [2013] UKUT 00042 (IAC). However, Rodriguez was further considered in the Court of Appeal, Rodriguez [2014] EWCA Civ 2, where the court almost entirely disagreed with the conclusions of the Upper Tribunal as to the applicability of an evidential flexibility policy to PBS cases. Ms Rodriguez had failed to demonstrate by her submitted bank statement that she had the necessary funds over the required 28-day period and her application for further leave to remain as a student was refused. The First-tier Tribunal decided that pursuant to section 85A it could not take account of further bank statements showing additional funds. She then appealed to the Upper Tribunal, relying on an evidential flexibility policy in a letter dated 19.5.11.
27. It should be pointed out that in Rodriguez, the incorporation of what was the evidential flexibility policy into the Immigration Rules at paragraph 245AA was not directly material to the three appeals before the Court of Appeal, as it came about after the relevant dates. The Court of Appeal was considering the contention that an evidential flexibility policy, referred to as the PBS Process Instruction, published in

June 2011, was the version potentially relevant to the three appeals before the court. The document appears as Appendix B to the Upper Tribunal Rodriguez decision.

28. The Court of Appeal found that the letter of 19.5.11 was not intended to herald an unequivocal relaxation of the Immigration Rules over and above the process instruction; it was merely referential to existing policy and mooted a temporary trial. At §92, it was held that taken overall, the process instruction, “is demonstrably not designed to give an applicant the opportunity first to remedy any defect or inadequacy in the application or supporting documentation so as to save the application from refusal after substantive consideration.” In Ms Rodriguez case there was no reason to believe that she had other funds available to her and she had not met the requirements of the Rules in that she failed to submit the specified documentation showing the required minimum amount over the 28 day period required. Consideration of the policy did not and would not have assisted Ms Rodriguez. The court found that the conclusion of the First-tier Tribunal in her case was correct.
29. The PBS Process Instruction policy, predating paragraph 245AA, purports to deal with missing evidence or a minor error. It states, inter alia, that there is no limit on the amount of information that can be requested from the applicant; that multiple pieces of evidence can be requested; and that where there is uncertainty as to whether evidence exists, benefit should be given to the applicant. At section 3, it provides that before seeking additional information, it must be established that the evidence exists, or sufficient reason to believe that it exists.
30. In any event, by the time of the facts in the present appeal, the PBS Process Instruction had been incorporated into the Immigration Rules on 6.9.12 in paragraph 245AA, setting out that only documents submitted with the application will be considered and that documents submitted after the application will only be considered in certain circumstances where 245AA(b) applies. This relates to a missing document in a sequence, or a document in the wrong format, or the supply of a copy instead of the original. “The UK Border Agency will not request documents where a specified document has not been submitted, or where the UK Border Agency does not anticipate that addressing the omission or error ... will lead to a grant because the application will be refused for other reasons.”
31. The examples set out at step 3 of the process instruction are virtually identical to paragraph 245AA as it stood in September 2012. In the circumstances, I find no significant difference in the application of the policy between this document and paragraph 245AA of the Immigration Rules. In any event, neither the application of the process instruction nor paragraph 245AA could rescue the several evidential failures in the present case. In the circumstances, it is not necessary to determine whether paragraph 245AA displaces the process instructions.
32. It is obvious that an error in a contract document cannot be cured in the same way as a missing document in a series or failure to provide an original document rather than a copy, as that would mean the creation of an entirely new contract document. Similarly, an advertisement that does not contain the correct information cannot be cured without a completely new advertisement. There was thus no basis for

considering there might be evidence in existence in relation to these two issues that met the requirements of the Rules. Further, the failure to provide the correct document to evidence that the business is subject to UK taxation does not fall within the types of documents set out in 245AA(b), or the process instruction. This was not an error in the documentation supplied but a complete failure to provide the required documentation to meet this part of the requirements. In the circumstances, there was no requirement for the Secretary of State to make further enquiries of the claimant in relation any of these evidential failures.

33. In summary, the claimant's case is not assisted by considerations of evidential flexibility. It follows that Judge Duff erred in law in concluding that the appeal should be allowed on that basis.
34. Judge Duff went on to consider the claimant's circumstances under article 8. However, as Mr Reynolds accepts, if the Secretary of State's decision were not in accordance with the law, Judge Duff should not have gone on to consider article 8 but should have allowed the appeals to the limited extent that it remained for the Secretary of State to make decisions that were in accordance with the law. Thus, even on the claimant's there was an error of law in the decision of Judge Duff such that the determination cannot stand.
35. I turn now to article 8 considerations. The First-tier Tribunal allowed the appeals on the basis of article 8 family and private life.
36. Judge Duff noted at §17 that this claimant, unlike Mr Shamim, does not have an established family in the UK, but found that he had a very well developed private life, a part of which was the business in which they were engaged. The judge considered that it would be completely artificial and unfair to come to different conclusions in relation to each of them. This is an error of law since at this part of the determination the judge was considering not the application of the Rules, but this claimant's private life in the UK. The judge relied on the family life of Mr Shamim to justify permitting this claimant to succeed under article 8. I can see no justification for doing so.
37. Article 8 provides that:

"Everyone has the right to respect for his private and family life, his home and his correspondence.

*"There shall be no interference by a public authority with the exercise of this right **except** such as is **in accordance with the law** and is **necessary** in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

38. At paragraph 17 of Razgar v Secretary of State for the Home Department [2004] UKHL 27, Lord Bingham of Cornhill stated:

"In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the Tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the

questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on Article 8, these questions are likely to be:

(1) Will the proposed removal be an interference by a public body with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

(3) If so, is such interference in accordance with the law?

(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

39. Following Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640 (IAC) it is clear that on the current state of the authorities:

"After applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin);"

40. Broadly speaking MF (Nigeria) [2013] EWCA Civ 1192 and Nagre make clear that the Immigration Rules as now in force are to be read as incorporating Article 8 of the ECHR but, of course, the existing jurisprudence continues to bind the decision maker and the courts in its interpretation of those Immigration Rules. Put another way, a decision purporting to be made in compliance with the Rules will only be sustainable if it is reconcilable with those legal principles as well as the structure of the Rules itself. Otherwise the decision maker will have failed to apply the respondent's policy that refusal of the application must not result in unjustifiably harsh consequences such as to be disproportionate under Article 8. Only if there were arguably good grounds for granting leave to remain outside the rules would it be necessary for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules.
41. Taking full account of those matters recited by Judge Duff and other matters evident in the case papers before me, I find no compelling circumstances, for granting leave to remain outside the Immigration Rules on the facts of this appeal. Neither do I find evidence sufficient to render the decision either disproportionate or unjustifiably harsh; whichever test is applied. There were clearly stated rules for leave to remain, with which the claimant has not complied. The claimants must be taken to understand that they have no inherent right to remain in the UK unless and until they can comply with the Immigration Rules for doing so.
42. In his article 8 considerations, Judge Duff referred to the Razgar steps in considering article 8, but found that the interference was not necessary for the enforcement of immigration policy. With respect, that was a misunderstanding and misconstruction of the Razgar steps. In essence, the judge conflated the necessity of protecting the

economic well-being of the country with the proportionality balancing exercise and in doing so made a material error of law.

43. The judge then went on to consider at §17 that he had, “not the slightest doubt that the decision was entirely disproportionate in relation to the trivial failures in respect of the immigration rules,” and purported to additionally allow the appeal on that basis. Whilst the judge was entitled to take account of the claimant’s private life, there was little reasoning evident in the determination for a conclusion that such private life was sufficient to render the decision disproportionate. There is little more than the fact that he has been in the UK for a number of years and is engaged in business with Mr Shamim. The judge cites no other factors in the claimant’s favour.
44. Further, the judge entirely failed to take into account in the balancing exercise the very significant factors weighing in favour of the Secretary of State’s decision, including that the claimant had failed to meet the requirements of the Immigration Rules for leave to remain in the UK. The judge erred in concluding which provisions of the Rules had not been complied with. The judge, also wrongly, took into account his conclusion that the claimant should have been given the opportunity to correct what he described as a minimal failure to comply with two trivial aspects of the Immigration Rules.
45. Once one strips out the errors of law from the proportionality assessment, there remains little, if anything, in favour of permitting the claimant leave to remain outside the Immigration Rules. In the circumstances, without needing to elaborate further, it is clear that the article 8 proportionality assessment, if such was required at all, was fatally flawed.
46. Further, on the present case, whilst the evidence that did not accompany the application and was excluded from consideration in respect of the Rules, could potentially be brought into play in relation to article 8, it does little to strengthen such an article 8 claim, as the claimant is not entitled to succeed on the basis of article 8 simply by the degree to which he failed to meet the Immigration Rules.
47. In granting permission to appeal, Judge Frances noted that the grounds submitted that, following Miah [2012] EWCA Civ 261, the First-tier Tribunal wrongly applied the Near-miss principle in the assessment of proportionality.
48. “It is arguable that the judge erred in law in finding that the Evidential Flexibility Policy applied and it was unfair not to give the First (claimant) an opportunity to correct the omission, given that the first (claimant) had failed to supply specified documents. Further, contrary to Miah, the judge appears to have applied the near-miss principle in his assessment of proportionality. The grounds are arguable.”
49. In Miah, Burnton LJ stated at §26, “In my judgement, there is no Near-Miss principle applicable in the Immigration Rules. The Secretary of State, and on appeal the Tribunal, must assess the strength of an article 8 claim, but the requirements of immigration control is not weakened by the degree of non-compliance with the Immigration Rules.” It follows that it is not open to the Tribunal to allow the appeal on the basis of a near miss, as held in MM and SA (Pankina: near-miss).

50. Further, in Patel [2013] UKSC 72 Lord Carnwath said:

“55. Thus the balance drawn by the rules may be relevant to the consideration of proportionality.....

56. Although the context of the rules may be relevant to the consideration of proportionality....this cannot be equated with a formalised “near-miss” or “sliding scale” principle.....Mrs Huang’s case for favourable treatment outside the rules did not turn on how close she had come to compliance with rule 317, but on the application of the family values which underlie that rule and are at the heart of article 8. conversely, a near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit.

57. It is important to remember that Article 8 is not a general dispensing power. It is to be distinguished from the Secretary of States’ discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right....”

51. The facts of Patel & others are worth summarising. Mr Alam’s application for leave to remain as a Tier 4 student under the PBS system was refused as he had failed to provide the relevant documentation with his application. By the time of the First-tier Tribunal appeal he had produced qualifying bank statements but the Tribunal held that they were excluded from consideration by section 85A, but went on to regard the evidence as relevant to article 8 and found the decision disproportionate on the basis that the appellant now met the requirements of the Rules. The Upper Tribunal reversed the decision of the First-tier Tribunal, finding that the judge had erred in treating the new evidence as effective compliance with the Rules for the purpose of article 8. The Supreme Court considered that the new evidence could be excluded insofar as it related to human rights grounds and article 8 considerations, and could take the evidence outside the scope of exception 2 in section 85A. However, on the facts of the case, the Supreme Court found no error in the approach of the Upper Tribunal, as there was little merit in the article 8 claim, even if some weight was given to the unusual circumstances in which he lost his ability to rely on the new evidence, because of when section 85A came into force. The evidence did not significantly improve the human rights case and there is no near miss or sliding scale principle to be applied.

52. For the reasons set out herein, I find that Judge Duff made clear errors in respect of his consideration of the appeals in application of the Immigration Rules, even though he ultimately concluded that the appeals could not succeed under the Rules, the degree to which they failed to meet the Rules was in fact greater than the judge concluded, which would also have a significant bearing on the proportionality of the decision under article 8.

53. As far as the near-miss argument is concerned, I am satisfied that Judge Duff was not consciously seeking to apply a near-miss principle to the appeal, but the effect of referring to the failure to satisfy, “two minor aspects of the rules,” and “trivial failures in respect of the immigration rules,” as justification for the decision to allow the appeal was to apply the purported near-miss principle to the case either

independently or as part of the article 8 proportionality assessment. That was also an error of law.

54. At the conclusion of the hearing before me, I reserved my decision on error of law. Mr Reynolds submitted that if I found only an error of law in relation to Judge Duff going on to consider article 8 when he found the decision was not in accordance with the law, I could remake the decision without any further hearing. However, if I found errors of law as contended for by the Secretary of State, he submitted that it should be remitted to the First-tier Tribunal.
55. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. However, the facts of this case are clear; it is the conclusions from and the application of the law to those facts which is in issue. In the circumstances, I see no purpose in remitting the appeal to the First-tier Tribunal and propose to remake it in the Upper Tribunal.
56. Before doing so, given that I adjourned before reaching a decision on error of law, I consider it appropriate to allow the parties the opportunity to make further representations in writing, should they choose to do so.

Conclusions:

57. For the reasons set out herein I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I reserve the remaking of the decision to the Upper Tribunal.

I issue directions.



Signed:

Date: 14 February 2014

Deputy Upper Tribunal Judge Pickup

Consequential Directions

58. The representatives of the Secretary of State and the claimants may submit further representations in writing within 14 days of the receipt of this error of law decision.

59. The appeal should be relisted before myself at the earliest available date thereafter convenient to the parties.
60. Failing written response, I will proceed to remake the decision consistent with the conclusions made herein.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeals have been set aside to be remade.



Signed:

Date: 14 February 2014

Deputy Upper Tribunal Judge Pickup