IAC-AH-AL-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/11213/2012
IA/11214/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 1 March 2013 and 28 April 2015	**On 8 May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

(1) MRS BARSHA JOSHI SHRESTHA
(2) MR BIBEK SHRESTHA

Respondents/Claimants

Representation:
For the Appellant: Mr C Avery (1 March 2013) and Ms A Fijiwala (28 April 2015)
For the Claimants: Mr Colin Yeo, Counsel (1 March 2013)

DETERMINATION AND REASONS

1. The Secretary of State appeals from the decision of the First-tier Tribunal allowing the appeal of the first claimant against the Secretary of State's decision to refuse to vary his leave to remain in the United Kingdom as a Tier 4 Migrant. The second claimant is her husband, and joined in the appeal as her dependant. His appeal against the refusal of further leave to remain was allowed in line with that of the first claimant. For ease of reference I shall hereafter refer to the first claimant as simply

the claimant, save where the context otherwise requires. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimants should be accorded anonymity for these proceedings in the Upper Tribunal.

2. On 28 April 2012 the Secretary of State gave her reasons for refusing the claimant's application for leave to remain as a Tier 1 (Post-Study Work) Migrant under the points-based system. She had been granted leave to enter the United Kingdom as a Tier 4 Migrant on 20 October 2009, and her leave in that capacity expired on 30 January 2012. Her application for leave to remain as a Tier 1 Migrant was made on 28 January 2012. With regard to Appendix C, she provided joint evidence of available funds intending to over the maintenance funds requirement for herself and her dependent partner. The documents she provided did not demonstrate that she had been in possession of £1,333 (£800 for herself and £533 for her dependant), for the period specified in the guidance.

3. She had to show that she had been in possession of at least £1,333 of available funds for a consecutive 90 day period ending no more than one calendar month before the date of her application. As evidence of this, she provided a bank statement for a Barclays Bank savings account showing balances from 15 September 2011 until 24 January 2012, bank statements for a Barclays Bank cash card account from 23 November 2011 until 16 January 2012, and a bank statement for her husband's Lloyds TSB account showing balances from 29 November 2011 until 19 January 2012.

4. UKBA had assessed the maintenance requirement from the period 27 October 2011 to 24 January 2012. However, from 27 October 2011 to 23 November 2011, the level of available funds fell below £1,333. So they were unable to award points for maintenance, in line with the published guidance and the Immigration Rules.

The Hearing Before, and the Decision of, the First-tier Tribunal

5. The claimants' appeals came before Judge Davidson sitting at Taylor House on 2 June 2012. Both parties were legally represented. At paragraph 5 of his subsequent determination, Judge Davidson directed himself that the appeal was governed by Section 85(4) of the Nationality, Immigration and Asylum Act 2002. Accordingly, the Tribunal could consider evidence about any matter which it thought relevant to the substance of the decision, including evidence which concerned a matter arising after the date of the decision. The judge continued: "I may therefore consider evidence about any matter which I consider relevant to the substance of the decision."

6. Later, at paragraph 15, he said that as this was an in country appeal, he had the authority to consider the situation appertaining at the date of the hearing, as opposed to that at the date of the decision.

7. The claimant gave oral evidence that they provided their solicitor with all their bank statements and the solicitor had assured them the amounts in their Barclays accounts would be sufficient, together with the sums in the husband's Lloyds Bank account: "They claim that they gave the relevant evidence of funds to the solicitor but the solicitor did not seem to submit it to the respondent."

8. At paragraph 20 the judge pronounced himself satisfied that both claimants were honest witnesses. At paragraph 23 he held as follows:

> "So far as funds are concerned the [claimants] claim that they had the required funds and gave the evidence of those funds to their representative who must have failed to pass it on. I have seen copies of the [claimants'] bank statements covering the relevant 90 days from 27.10.2011 until 19.1.2012, and it is clear that the [claimants] had considerably more than the minimum £1,333 throughout this period. I therefore find that they satisfied the requirements for maintenance (funds) under Appendix C and allow this appeal accordingly."

The Application for Permission to Appeal

9. On 13 August 2012 Jamela Hussain of the Specialist Appeals Team settled an application for permission to appeal to the Upper Tribunal. She argued that the appeal was allowed solely on the basis of fresh evidence, namely the evidence that was handed in after the Secretary of State had made the decision to refuse the application. The judge should not have had regard to that evidence. Section 85(4) of the 2002 Act allowed a Tribunal to consider any evidence it considered relevant to the substance of the decision *subject to the constraints imposed by Sections 85(5) and 85A*. Section 85A(4)(a) specified the Tribunal may only consider evidence relating to the acquisition of points in PBS cases which was submitted in support of, at the time of making, the application to which the immigration decision relates. In this case, the judge had considered evidence (bank statements) that was served after the date of the refusal decision. In fact they had only ever been produced at the hearing.

The Grant of Permission to Appeal

10. On 3 September 2012 Judge Robertson granted permission to appeal for the following reasons:

> "The only issue in this appeal is whether the judge considered post-decision evidence in relation to the maintenance requirement contrary to Sections 85(5) and 85A of the Nationality, Immigration and Asylum Act 2002. The judge found that evidence of funds had been provided [to] the appellants' solicitors but the latter had not forwarded this to the respondent (paragraph 23). The respondent submits that there was no evidence of this before her until the date of hearing. This is an arguable error of law."

The Error of Law Hearing in the Upper Tribunal

11. At the hearing before me, Mr Yeo, who did not appear below, conceded that the claimants had not complied with the relevant Immigration Rules relating to the maintenance requirement. They had not provided the bank statement evidence before the refusal decision which showed that they had available funds of at least £1,333 throughout a relevant 90 day period.

12. However, he submitted that the judge had not materially erred in law taking into account the evidence which had been provided after the decision. Alternatively, the decision should be remade in the appellant's favour, in the light of **Rodriguez**

(flexibility policy) [2013] UKUT 0042, a decision of the Upper Tribunal promulgated on 31 January 2013. The head note of **Rodriguez** reads inter alia as follows:

> "Since August 2009 UKBA has operated a policy relating to the processing and determination of applications under the points-based system ('PBS'). This was revised with effect from May 2011. In its policy letter of 19 May 2011, UKBA states that during an unspecified trial stage applicants will be contacted where mandatory evidence is missing from their applications and given the opportunity to provide this. UKBA is under a public law duty to give effect to this policy in all cases to which it applies."

13. Mr Avery submitted that **Rodriguez** was distinguishable from the present case on the facts. Unlike in **Rodriguez**, the claimants here had provided the mandatory evidence. They provided bank statements covering a 90 day period. So the caseworker dealing with the application would not have had sufficient reason to believe that some bank statements were missing.

14. In reply, Mr Yeo pointed out that the two perceived deficiencies in the financial information supplied by Ms Rodriguez were:

    (a) the bank statements spanned a period of seventeen day only, rather than 28 days.

    (b) Whereas the statements disclosed a credit balance exceeding £1,200 for most of this period, the balance fell to £903.74 during four days, from 20 to 23 January 2012.

15. Mr Yeo also drew my attention to the conclusion of the panel in **Rodriguez** at paragraph 12:

> "It [the UKBA letter of 19 May 2011] also heralded unequivocally the introduction of a new practice whereby all applicants would be notified of the absence of mandatory evidence from their applications and would be given the opportunity to rectify the relevant shortcoming prior to rejection ... we consider that, properly construed and evaluated in its entirety, the policy enunciated in the letter required the Respondent to notify the Appellant of the informational shortcomings in her application and to afford her the opportunity of rectification and addition prior to an adverse determination. It is conceded that the Respondent failed to do so."

Reasons for finding an Error of Law

16. One issue which is not contentious is that the refusal letter contained a Section 47 removal notice, which is unlawful. As Judge Davidson allowed the appeal against the refusal of leave to remain, it was not necessary for him to address the legality of the concomitant removal decision under Section 47. But since his decision on the refusal of variation of leave is under challenge, the legality of the removal direction comes into focus. As is illuminated in **Adamally**, the Section 47 removal notice was not in accordance with the law, and I so declare. It does not matter that this point was not taken in the First-tier Tribunal.

17. Turning to the appeal against the refusal of leave to remain, I am in no doubt that Judge Davidson erred in law in taking into account bank statement evidence that had

not been provided to the Secretary of State in advance of the refusal decision. He was bound to disregard such evidence by statute. This is affirmed by the Upper Tribunal in **Rodriguez**, at paragraph 6:

> "While the judge does not indicate whether the new evidence would be admitted – and, thus, considered by the Tribunal – it would appear that, by implication, it was excluded. We consider that it had to be disregarded, by virtue of Section 85A of the 2002 Act."

18. I turn to consider whether the claimants' position is salvaged by **Rodriguez**. I accept that the policy discussed by the Tribunal in **Rodriguez** is sufficiently wide in its ambit to encompass the informational deficiency in the claimants' application, albeit that the claimants had provided bank statements for an entire 90 day period, and so there were no bank statements missing in a simplistic sense. I accept Mr Yeo's submission that it was possible for the caseworker to deduce from the bank statements which had been provided that the Lloyds TSB account and the cash card account had not just been opened, and therefore there was a very real possibility that either of them would show sufficient funds in the previous month. The one set of bank statements covering the entire 90 day period showed a credit balance consistently in excess of £1,000, and therefore there did not need to be a significant credit balance in either of the other two accounts in the preceding month for the threshold of £1,333 to be reached.

19. On the other hand, my attention has not been drawn to the existence of a letter such as that received by the appellant in **Rodriguez**, whereby, following submission of her completed application, the appellant received a letter from the respondent indicating that the caseworker would write to her as soon as possible if there was any problem with the validity of the application, such as missing documentation. Furthermore, given the implicit finding of negligence on the part of the claimant's solicitor (who had apparently been given all the necessary bank statements, but had inexplicably failed to pass some of them on to UKBA) there is a real issue as to whether such notification would have been acted upon. Put another way, on a holistic assessment it is reasonable to question whether the claimants can be said to be the victims of unfair treatment at the hands of UKBA rather than the victims of negligence by their solicitor.

20. A further distinction between this case and that of **Rodriguez** is that in **Rodriguez** it was argued before the First-tier Tribunal that UKBA had operated in breach of the Policy of Evidential Flexibility in considering the PBS application: and either before the First-tier Tribunal or at the hearing in the Upper Tribunal the Secretary of State made factual concessions about the appellant's individual circumstances which the Upper Tribunal relied on in coming to the conclusion that she was entitled to relief.

21. In contrast, the First-tier Tribunal Judge here was not asked to address the question of an alleged breach of the Policy of Evidential Flexibility, and it has been raised for the first time at, and not before, the error of law hearing in the Upper Tribunal.

22. In all the circumstances, I consider that the appropriate course is not to make a ruling on the issue, but to adjourn the remaking of the decision to a resumed hearing at which both parties will have the opportunity to put in further evidence on the **Rodriguez** question.

Directions for Resumed Hearing

23. The burden of proof rests with the claimant to show that she is entitled to relief for breach of the Policy of Evidential Flexibility. The evidence which will assist me in deciding whether the decision should be remade in her favour on this ground is as follows:

    (a) All correspondence passing between the claimant's solicitor and UKBA concerning the application;

    (b) Clarification on which bank statements were handed over to the solicitor, and which bank statements were not passed on by the solicitor to UKBA;

    (c) Evidence about the applicability of the Policy to the application (beyond that contained in **Rodriguez** itself)

    (d) Why (if this be the case) the caseworker handling the application did not ask the claimant/her solicitor to supply additional bank statements for the period in respect of which only one bank statement had been provided?

24. I appreciate that only the Secretary of State can put in evidence on the last point, but the claimant can put in evidence on points (a) and (b); and she may be able to put in evidence on point (c).

25. I direct that the resumed hearing before me to remake the decision shall not take place before 26 March 2013. Not less than 7 days before the resumed hearing the parties shall serve upon the Upper Tribunal and upon each other a paginated and indexed bundle of all the documents upon which they propose to rely for the purposes of remaking the decision. My time estimate is 1 hour.

The Resumed Hearing in the Upper Tribunal

26. There was a two year delay in this case coming back to me for the resumed hearing. The claimants attended in person, without legal representation.

27. For the purposes of remaking the decision, I received oral evidence from the claimants, who tendered a joint witness statement which addressed the first and second directions made by me for the resumed hearing.

28. The solicitors who had hitherto had the conduct of their appeal in the Upper Tribunal were Lawrence Lupin Solicitors, and they showed me correspondence between Lawrence Lupin Solicitors and their previous solicitors in which Lawrence Lupin Solicitors had requested the respondent's file, and in particular all correspondence passing between the firm and UKBA concerning the claimants' application. As of March 2013 the position taken by the previous firm of solicitors

was that they did not have any documents, and all the documents were in the possession of the second claimant. Following the error of law hearing and my directions, Lawrence Lupin Solicitors made another attempt to obtain documents from the previous firm. The initial response was that the caseworker concerned was away on holiday, but he/she would get in touch when he/she returned. It does not appear that this happened, as Lawrence Lupin Solicitors sent a number of chasing letters subsequently. The second claimant informed me that he had recently gone round the premises from which the firm used to operate, and the firm was not there. So, as far as he was concerned, the firm had closed down.

29. However he was able to assist on the question of which bank statements were handed over to the previous firm of solicitors. In addition to those contained in section G of the Home Office bundle, he said that he had provided Lloyds TSB current account statements for the period 17 September 2011 to 9 November 2011; Lloyds TSB bank statements for the period 9 November to 29 November; and a Barclays current account statement for the period 22 October 2011 to 22 November 2011.

30. I noted that the bundle of documents relied on by him and his wife before the First-tier Tribunal only included two of the three "missing" sets of bank statements. What was missing from the appellants' bundle was a set of Lloyds TSB statements covering the period 9 November to 29 November 2011.

31. In the signed joint witness statement, the claimants said they could not confirm which bank statements were sent to UKBA as they never received confirmation from their solicitor or a cover letter to confirm the same.

32. In her submissions on behalf of the Secretary of State, Ms Fijiwala referred me to the PBS process instructions on evidential flexibility as of 18 May 2012. The covering letter to the guidance says that it is the latest version of the evidential flexibility policy that was first introduced on 10 August 2009. She also referred me to **Rodriguez [2014] EWCA Civ 2**. She submitted that on the evidence available to the caseworker it was reasonable for the caseworker not to request additional information or documents from the claimants on the maintenance requirement.

33. In reply, the second claimant said that they had been badly let down by the previous firm of solicitors. The consequences for them are very harsh, as his wife was a genuine student. Moreover, she had recently given birth to their child, and their home in Nepal had been destroyed by the recent earthquake.

Discussion and Findings on the Evidential Flexibility Argument

34. It is not shown on the balance of probabilities that any bank statements were provided to the Home Office beyond those contained in section G of the Home Office bundle. Thus, on the evidence available to the caseworker assessing the application, between 27 October and 23 November 2011, the level of available funds fell below £1,333. Accordingly, the caseworker was prima facie right not to award points for maintenance.

35. The question which arises is whether the caseworker should have asked the claimants' solicitors to provide additional evidence before making a decision on the application.

36. The introduction to the latest version of the policy guidance as of May 2012 states as follows: "However, requests for information should not be speculative, we must have sufficient reason to believe that any evidence requested exists."

37. Step three of the procedure on evidential flexibility instructs the caseworker that he should only go out for additional information in certain circumstances which would lead to the approval of the application: "Before you go out to the applicant you must have established that evidence exists, or have sufficient reason to believe the information exists."

38. The non-exhaustive list of examples includes "bank statements missing from a series".

39. The bank statements in section G of the Home Office bundle purported to cover a 90-day period. The first claimant's monthly savings account with Barclays ran from 15 September 2011 to 9 January 2012. The statement for the second claimant's current account with Lloyds TSB Bank ran from 29 November 2011 to 19 January 2012. Finally, two statements had been provided for the first claimant's cash card account with Barclays. The first covered the period 23 November to 22 December 2011, and the second covered the period 23 December 2011 to 16 January 2012.

40. It would have been apparent to the caseworker that the claimants had the assistance of a firm of solicitors in making their application, and it also would have been apparent to the caseworker that a mosaic of overlapping bank statements had been provided which covered the required 90-day period. In the circumstances, I do not consider that the caseworker should have suspected that there were missing bank statements. There was no reason to suppose that the mosaic of overlapping bank statements was incomplete and/or that one or more further statements in respect of one or more of the accounts had been accidentally omitted. It would have been speculation on the part of the caseworker to consider whether or not the claimants might have had other funds elsewhere. The caseworker was not to know that the claimants had such funds, or that a mistake had been made in the application by the failure to provide a more comprehensive mosaic of overlapping bank statements in respect of the three bank accounts operated by the claimants. Accordingly, I find that the decision appealed against is in accordance with the law, and there was no breach of evidential flexibility in the caseworker failing to give the claimants the opportunity to remedy the defect in their application.

41. As I explained to the second claimant at the hearing, the negative outcome of this appeal does not prevent his wife from making a renewed application for leave to remain as a student, or from them making an application for leave to remain on the basis of exceptional circumstances having regard to the impact on them of the recent earthquake in Nepal. I explained that provided any such application is made within

28 days of their appeal rights being deemed to be exhausted, they will not be treated as overstayers.

Conclusion

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted:

The claimants' appeal against the decision to refuse the first claimant leave to remain as a Tier 4 (General) Student Migrant is dismissed.

No anonymity direction is made.

Signed Date **7 May 2015**

Deputy Upper Tribunal Judge Monson