Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU071822015
HU071832015
HU071842015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 July 2017	**On 14 August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MRS NAJMA KIANI
MISS FAZEELA KIANI
MR MOAZAM SULTAN KIANI
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Unrepresented. The Sponsor attended in person.
For the Respondent: Mr T. Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. This appeal came before me for an error of law hearing on 19 July 2017. I found an error of law in the decision of the First tier Tribunal, which I append. The parties agreed I could re-make the decision without the need for an oral hearing, but with the assistance of written submissions, which I have now received.

2. The only issue outstanding, it now being accepted that the Appellants meet the financial requirements of the Rules, is whether the Entry Clearance Officer erred in failing to contact the first Appellant to request an English language certificate from an approved provider, in line with the principle of evidential flexibility. This is now set out in Appendix FM SE, the relevant provisions of which are as follows:

"*Family Members - Specified Evidence*

A. This Appendix sets out the specified evidence applicants need to provide to meet the requirements of rules contained in Appendix FM and, where those requirements are also contained in other rules, including Appendix Armed Forces, and unless otherwise stated, the specified evidence applicants need to provide to meet the requirements of those rules.

B. Where evidence is not specified by Appendix FM, but is of a type covered by this Appendix, the requirements of this Appendix shall apply.

C. In this Appendix references to paragraphs are to paragraphs of this Appendix unless the context otherwise requires.

D. (a) In deciding an application in relation to which this Appendix states that specified documents must be provided, the Entry Clearance Officer or Secretary of State ("the decision-maker") will consider documents that have been submitted with the application, and will only consider documents submitted after the application where sub-paragraph (b), (e) or (f) applies.

(b) If the applicant:

(i) Has submitted:

(aa) A sequence of documents and some of the documents in the sequence have been omitted (e.g. if one bank statement from a series is missing);

(bb) A document in the wrong format (for example, if a letter is not on letterhead paper as specified); or

(cc) A document that is a copy and not an original document; or

(dd) A document which does not contain all of the specified information; or

(ii) Has not submitted a specified document, the decision-maker may contact the applicant or his representative in writing or otherwise, and request the document(s) or the correct version(s). The material requested must be received at the address specified in the request within a reasonable timescale specified in the request.

(c) The decision-maker will not request documents where he or she does not anticipate that addressing the error or omission referred to in sub-paragraph (b) will lead to a grant because the application will be refused for other reasons…

(f) Before making a decision under Appendix FM or this Appendix, the decision-maker may contact the applicant or their representative in writing or otherwise to request further information or documents. The material requested must be received at the address specified in the request within a reasonable timescale specified in the request."

3. In his submissions of 20 July 2017, at *inter alia* [10]-[14] Mr Melvin submitted that: '10….*if the ECO had contacted the appellant on receipt of the application to request within 7 days , as is customary, a valid English language certificate one still would not have been available. The Court of Appeal considers the evidential flexibility policy in* ***SoS V Rodriquez EWCA CIv.2 [2014****] below is an excerpt from paragraph 48*

> *The instruction enabled caseworkers "to query details or request further information, such as a missing wage slip or bank statement from a sequence". Following analysis and review, as it was said, there had been "two significant changes" to the original Evidential Flexibility instruction. These were identified as follows:*
>
> 1. *The time given to applicants to produce additional evidence has been increased from three working days* ***to seven working days****; and*
> 2. *There is now no limit on the amount of information that can be requested from the applicant. However, requests for information should not be speculative, we must have sufficient reason to believe that any evidence requested exists."*

11. It is submitted that it is trite law that only documents submitted with the application would be considered and that the "evidential flexibility policy" ***applies only*** *to documents that are in existence as at the date of application.*

13 … the facts of this appeal do not show that any of the exceptions referred to in D (underlined (b)(e)(f)) above apply to this appeal.

14. By analogy, in relation to PBS etc appeals it will be submitted that the Upper Tribunal have made it abundantly clear that; per paragraph 245AA(c) of the Rules, there is no obligation on UKBA to request documents in circumstances where "a specified document has not been submitted". The assertion is to the effect that an "evidential flexibility" policy of sorts survived the introduction of

paragraph 245AA. The latter provision of the Rules came into operation on 06 September 2012."

4. In his response of 3 August 2017, Mr Kiani submitted:

(i) *Rodriquez* [2014] EWCA Civ 2 which does not apply to the appellant's case because the above decision deals with the applications made under the provisions of part 6 of the immigration rules which is about the **points based system**;

(ii) The judgement of the Court of Appeal in *Rodriguez* has been overruled by the Supreme Court in the decision of the case of *Mandalia* [2015] UKSC 59;

(iii) Section 245AA of the part 6 of the immigration Rules quoted by the respondent in paragraph 14 of the written response also does not apply to the appellants case because this part of the rules deals with the applications made under points based system.

5. *Rodriquez* [2014] EWCA Civ 2 was in fact linked to the case of Mandalia, which was successfully appealed to the Supreme Court. Consequently, I accept Mr Kiani's submission that *Rodriguez* has been overturned by the subsequent judgment of Lord Wilson in the Supreme Court.

6. In *Mandalia* [2015] UKSC 59, their Lordships held at [35]-[36]:

"35. In one sense every request by a caseworker for further evidence would have been "speculative" but what was there in Mr Mandalia's application to render a request to him more "speculative" than any other? Was there not, at the very least, doubt, the benefit of which should have been given to him?

Answer
36. I conclude that the answer to the question identified in para 1 above is "yes": the agency's refusal of Mr Mandalia's application was unlawful because, properly interpreted, the process instruction obliged it first to have invited him to repair the deficit in his evidence."

7. I have further had regard to the post *Mandalia* jurisprudence. In *SH (Pakistan)* [2016] EWCA Civ 426, a case involving a Tier 1 Entrepreneur whose application was refused on the basis that he did not meet the English language requirement. Lord Justice Elias, with whom Lords Justices Beatson & Vos agreed, held at [21]-[23] follows in respect of the evidential flexibility policy in play in that case, that it was not circumscribed by paragraph 245AA of the Rules and was indeed much wider than the very particular circumstances set out in the Rules.

8. I have further taken account of the contents of paragraph 32D of Appendix FM SE which provides:

"If an applicant applying for limited leave to enter or remain under Part 8 or Appendix FM submits an English language test certificate or result and the Home Office has already accepted it as part of a successful previous partner or parent application (but not where the application was refused, even if on grounds other than the English language requirement), the decision-maker will accept that certificate or result as valid if it is:
(a) from a provider which is no longer approved …"

9. I am bound to observe that it would be odd, having succeeded in a previous partner or parent application, for an applicant to subsequently have to apply for limited leave. Whilst the Appellants were not successful in their previous entry clearance application it is the case that that application was refused on the basis of the financial requirements only, owing to the fact that the English language test certificate provider was on the approved list at that time. However, between February 2014 and April 2015, when the second application was made, the test provider was no longer approved. I further find as a fact that the only reason that a new English language test certificate was required was due to the delay in making entry clearance decisions in light of the pending judgment in *MM (Lebanon)* in the Court of Appeal.

10. I have given careful consideration to the terms of the evidential flexibility policy, in particular DA *viz* the Entry Clearance Officer … will consider documents that have been submitted with the application, and will only consider documents submitted after the application where sub-paragraph (b), (e) or (f) applies …(b) If the applicant:(ii) Has not submitted a specified document, the decision-maker may contact the applicant or his representative in writing or otherwise, and request the document(s) or the correct version(s). The material requested must be received at the address specified in the request within a reasonable timescale specified in the request.

11. I find that an English language test certificate is a "specified document." Whilst an English language test certificate was submitted with the application made on 3 April 2015, it was not the "correct version" given that the provider was no longer on the approved list. I find that the Appellants fall squarely with the evidential flexibility policy and that the Entry Clearance Officer's failure to apply the policy was not in accordance with the law, as it was not in accordance with her policy.

12. Mr Melvin submitted that, in any event, the Appellants could not have succeeded with regard to the evidential flexibility policy because it is customary to give applicants 7 days to produce the specified document and an English language test certificate would still not have been available. However, this is an unknown in that, had the ECO contacted the first Appellant, she may have been able to take a test with an approved provider within 7 days, if indeed that timescale is applicable on these particular facts,

which I am not persuaded it is. I do not accept Mr Melvin's submission at [11] that it is trite law that *only documents submitted with the application would be considered* and that the "*evidential flexibility policy" applies only to documents that are in existence as at the date of application*, as no evidential or jurisprudential basis has been provided to support these assertions. I do not consider that the extract cited from [48] of *Rodriguez* can properly apply to the circumstances in this case, given that the policy in that case was a previous policy relating specifically to Tier 4 applicants rather than family members and there are no such restrictions contained in the policy under consideration *viz* Appendix FM SE, Family Members – specified evidence.

13. I am bound to observe that the underlying purpose of the requirement to produce an English language test certificate is to demonstrate that the applicant has attained a particular standard in English, so as to be able to integrate and seek employment upon entry to the United Kingdom. There is no question that the Appellant attained that standard as she passed her previous English language test. She also took a further test – the IELTS Life Skills A1 with an approved provider in February 2016 and passed it, albeit this is post decision evidence.

14. I have concluded in light of the written submissions and the jurisprudence that the failure by the Entry Clearance Officer to apply the evidential flexibility policy was not in accordance with the law. In light of the amendments to the appeal provisions of the NIAA 2002, in particular section 86, there is no power by the Tribunal to remit appeals to the Entry Clearance Officer but only to determine any matter raised by section 85 or as a ground of appeal, the effect of which is that the Tribunal is the primary decision-maker. In the Presidential decision in *Greenwood No 2* (para 398 considered) [2015] UKUT 00629 (IAC) the panel held at [21] that:

"If the effect of the Tribunal's decision was to conclude that the decision of the Secretary of State under appeal was unlawful and the Tribunal did not substitute another decision:
(a) if the decision of the Secretary of State involved a determination of an application made by the litigant, a lawful decision remains to be made by the Secretary of State – and it is preferable that the FtT say so clearly;
(b) alternatively, if the challenge in the appeal was to an "own motion" decision of the Secretary of State, it would be a matter for the Secretary of State to decide whether a further decision should be made in the wake of the FtT's decision.

15. The Upper Tribunal expressly held at [23] that this power survives the amendments to the appeal provisions of the NIAA 2002.At [25] the panel further suggests that, in certain circumstances [unconsidered and undetermined cases] the Tribunal is obligated to take on the role of primary decision maker. However, this is not a case where the application was unconsidered or undetermined. In these circumstances, in light of my finding that the decision of the Entry Clearance Officer was unlawful, the correct

decision is to find that a lawful decision remains to be made by the Secretary of State.

16. I am conscious that due to the passage of time since the first application for entry clearance was made in February 2014, the second Appellant is now no longer a child and the Third Appellant will also shortly turn 18 years of age. Given that the delays were due essentially to entry clearance applications being placed on hold pending the outcome of the *MM Lebanon* litigation, I do not consider that it would accord with the common law principle of fairness or the best interests of the second and third Appellant for their entry clearance applications to now fail on the basis of their ages. Thus consideration needs to be given to the grant of entry clearance to the second and third Appellants outside the Rules, with regard to their family life with both their parents. There would appear to be no reason why the first Appellant's application for entry clearance should not succeed, given that the requirements of the Rules are met.

17. The appeals are allowed to the extent that the applications for entry clearance remain outstanding before the Entry Clearance Officer for a lawful decision to be made.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

12 August 2017

ANNEX

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(Immigration and Asylum Chamber)

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THE IMMIGRATION ACTS

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Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MRS NAJMA KIANI
MISS FAZEELA KIANI
MR MOAZAM SULTAN KIANI
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Unrepresented. The Sponsor attended in person.
For the Respondent: Mr T. Melvin, Home Office Presenting Officer

ERROR OF LAW DECISION AND REASONS

1. The Appellants are nationals of Pakistan, born respectively on 3.6.74; 22.9.97 and 23.8.99. On 3.4.15 they made a second application for entry clearance in order to join the Sponsor, the husband of the first Appellant and father of the second and third Appellants, who is a British citizen. The applications were refused in decisions by an Entry Clearance Officer dated 28.8.15 on the basis that the Appellants failed to meet the financial requirements of the Rules and that the English language requirements. The Appellants appealed against those decisions.

2. The appeals came before First tier Tribunal Judge Thomas for hearing on 19 October 2016. In a decision promulgated on 17.11.16 the Judge dismissed the appeals on the basis that the first Appellant did not meet the English language requirement at the date of decision because at the time of the present application the Respondent no longer accepted the TOEIC ETS certificate and whilst she had now provided a IELTS Life Skills A1 certificate for a test taken in February 2016 this was produced post decision. The Judge, however, found that the financial requirements were met in substance at the date of decision and consideration had not been given to the Sponsor's gross total income from two jobs.

3. An application for permission to appeal to the Upper Tribunal was made out of time by the Sponsor, who submitted *inter alia* that:

(i) at the time of making the first application for entry clearance the TOEIC ETS certificate was the specified document to prove the English language requirement. Whilst at the time of considering the second application the IELTS Life Skills A1 certificate was the specified document to prove the English language requirement, it was the responsibility of the ECO to request this certificate from the first applicant but the ECO erred in failing to provide the first applicant with an opportunity to provide this;

(ii) the FtTJ failed to consider that the ECO had not followed the procedure set out in FM-SE at D(b)(ii) *viz "if the applicant has not submitted a specified document, the decision maker may contact the applicant or his representative in writing or otherwise, and request the document or the correct version…"*

(iii) the first applicant subsequently passed the IELTS test and submitted the certificate during the appeal along with her degree certificate;

(iv) the Judge further erred in treating the second Appellant as an adult and in failing to consider her best interests, given that at the time of the application and decision she was under 18.

4. In a decision granting permission to appeal to the Upper Tribunal and extending time so as to admit the appeal in time, First tier Tribunal Judge Scott Baker held that the Judge failed to consider the application of the

evidential flexibility policy of the respondent, which was particularly relevant as the failure to provide the correct certificate was the only issue at large and the failure to make findings on this discloses an arguable error of law; the failure to treat the second Appellant as a minor and to consider her best interests was also an arguable error of law.

Hearing

5. At the hearing before me, the Appellants were unrepresented but the Sponsor, Mr Zafar Sultan Kiani, appeared on their behalf and made submissions in line with the grounds of appeal (which he had drafted). He relied upon a bundle that he had prepared which had been submitted on 3.7.17. He stated that his wife is a graduate and can pass anytime the English language course and that she did pass it and submit it with the application and the same certificate was submitted to the ECO but by that time the requirement was changed. He said that they only became aware of need to get a certificate from a different provider when they received the refusal decision. He stated that the evidential flexibility principle clearly states that if there is a document which is required the Respondent should contact the Appellant: Appendix FM-SE D (b)(ii) at page 37 of the Appellants' bundle and see also (f) on page 38. The Sponsor stated that his wife has passed the other test: page 142 dated 11.2.16. which proves she is competent in English and that the previous test results are set out at pages 143-144. The Sponsor further stated that his daughter was under 18 when she made the application and should be treated as a child under the Rules: Chapter 8 section 5A at page 36 at 2.1.

6. In his submissions, Mr Melvin relied upon the rule 24 but he accepted that this does not refer to the issue of the English language test. He submitted that the first refusal of entry clearance in August 2015 is based on the application made in April 2015 and it is incumbent upon anyone to meet the requirements of the Rules at the time of the application. It is clear from the 1.4.16 decision which upheld that first decision that the Respondent took issue with both the financial requirements and the English language certificate. He submitted that the Judge has considered Article 8 in line with the Rules and has approached the appeal correctly and Appendix FM- SE states that the requirements of the Rules need to be met at the date of application.

7. Mr Melvin expressly accepted the submission made by the Sponsor on the points he raised about evidential flexibility but sought to point out that the Rules make it clear that it is discretionary ie the ECO may contact an applicant. He submitted that the Upper Tribunal has considered evidential flexibility at great length on many occasions and the discretion of the ECO has been upheld in all the reported caselaw. He submitted that there is no material error of law in the decision of the First tier Tribunal; the Judge has considered the Rules applicable and found that the Appellants cannot meet

those Rules and has considered whether there are circumstances which warrant consideration outside the Rules and as such dismissed the appeal.

Decision and reasons

8. I find that First tier Tribunal Judge Thomas materially erred in law and I announced my decision at the hearing. I now give my reasons.

9. The refusal decisions dated 28.8.15 state in terms: "*I have considered the provision of evidential flexibility as set out in paragraph D of Appendix FM-SE. I have not deemed it appropriate to exercise evidential flexibility in this case as it falls for refusal on other grounds.*" However, despite the fact that the issue was expressly raised by the ECO it was simply not considered at all by the Judge, despite the fact that the issue of the English language certificate was the only remaining basis for refusing the application once the Judge accepted that the financial requirements of the Rules were met.

10. Moreover, the Judge was aware [4 refers] that this was a second application for entry clearance, the first having been refused on grounds of financial requirements alone. At that time, therefore, the English language test certificate supplied by the first Appellant met the requirements of the Rules. There was then substantial delay on the part of the Respondent due to the fact that entry clearance decisions concerning the financial requirements of the Rules were put on hold pending judgment in *MM (Lebanon)*. Thus by the time that the second application was made, ETS were no longer licensed to award TOEIC and thus the certificate was invalid.

11. In these circumstances, I consider that it was incumbent upon the Judge to consider the refusal by the ECO to exercise discretion in light of Appendix FM-SE and the failure so to do is a material error of law.

12. I indicated and the parties agreed that I could proceed to re-make the decision. Mr Melvin indicated that he would wish to make written submissions prior to a decision being taken. I acceded to this request and append directions in order that a decision can be made expeditiously, given the undue delay that has already taken place in respect of these applications for entry clearance.

DIRECTIONS

1. Mr Melvin to provide written submissions by 4pm on 27 July 2017 and to serve via email to dutjudge.chapman@ejudiciary.net and to the Sponsor: z.zafarsultan@yahoo.co.uk.

2. If the Sponsor wishes to respond, the deadline for submissions is 4pm on Friday 4 August 2017 and they should be sent by email to: Tony.Melvin@homeoffice.gsi.gov.uk and dutjudge.chapman@ejudiciary.net.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

19 July 2017