Leave to remain and the opportunity to remedy deficiencies in applications

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Immigration analysis: Should the Secretary of State be required to make further enquiries in every case where there is a failure to meet the requirements of the Immigration Rules? Ramby de Mello, a barrister at No 5 Chambers, says the clear message given in Rodriguez is that applicants must have a sure understanding of what their obligations are to submit documents and evidence under the relevant rules.

Original news

Rodriguez v Secretary of State for the Home Department; Mandalia v Secretary of State for the Home Department [2014] EWCA Civ 2, [2014] All ER (D) 119 (Jan)

Three claimant foreign nationals were refused leave as Tier 4 (General) student migrants for failure to meet maintenance funding requirements. They contended that the defendant Secretary of State had been obliged to give them the opportunity to remedy the deficiencies in their applications before refusing them. The First-tier Tribunal (Immigration and Asylum Chamber) and the Upper Tribunal (Immigration and Asylum Chamber) had given inconsistent decisions in the cases. The Court of Appeal, Civil Division, decided that the Secretary of State had not been required to give the claimants the opportunity of putting right the short comings in the specified information included with the application so as to show that they could meet the necessary requirements in order to obtain the relevant points for maintenance funding before refusing the applications.

What was the background to this case?

In this appeal the applicant sought leave as a Tier 4 (General) student migrant to remain for the purpose of study in the United Kingdom under the Points Based System (PBS).

She submitted an application but failed to supply evidence in the form of bank statements necessary to attract an award of the points needed to satisfy the maintenance funding requirements. She had not met the requirements of the Immigration Rules in that the specified bank statements supplied by her did not show continuous possession of the required minimum amount over a consecutive 28-day period. Her application was refused although she had other available funds, not known to the Secretary of State, which if provided with the application would have sufficed to satisfy the maintenance funding requirements. The applicant contended that instead of refusing her application the Secretary of State was obliged to have applied her policy known as the 'Evidential Flexibility policy' and should have first contacted her to enable her to remedy the deficiencies in her application, particularly given that she received a letter from the case worker stating that he would contact her if the application was incomplete.

What issues did the case raise?

The issue arising in this case is whether the Secretary of State was required to afford the applicant such an opportunity before refusing her application and whether the policy applied in her favour.

To what extent is the judgment helpful in clarifying the law in this area?

The Court of Appeal ruled that the Secretary of State was not required under the policy, first, to give the applicant that opportunity of remedying her defective application. The policy did not require the Secretary of State, in every case where there was a failure to meet the requirements of the Immigration Rules, to make further enquiries. The Secretary of State was not to know that the applicant had such funds, or that she had made a mistake in her application. Accordingly, the policy did not apply favourably to her case.

As far as the letter sent to the applicant that she would be notified if the application was incomplete, the court decided that such letters are dealing with the validity of applications (ie the mandatory information required)--not with the substantive issue of the points to be awarded as disclosed on consideration of the information supplied, including specified documentation.

The second point of importance the court ruled on was the circumstances where the policy would apply. The court noted that the Immigration Rules distinguish between information which is mandatorily required on an application form and information contained in the specified documents (passports, photographs etc). Failure to provide mandatory information may mean that an application will be rejected at the outset as invalid without further consideration under the policy. On the other hand, a failure to supply specified documents (one missing bank statement in a series of bank statements) sufficient to establish the required number of points would not lead to an application being rejected at the outset as invalid--rather it would be refused after substantive consideration. In such a case the Secretary of State would take into account the policy. The instruction enabled caseworkers in the second example 'to query details or request further information, such as a missing wage slip or bank statement from a sequence' but did not require the case worker to go further than that. The purpose of the policy was to correct minor errors or omissions in applications.

Who does this case affect and what are their options following this decision?

The Secretary of State submitted to the court that the policy is no longer in existence as the new Immigration Rule, para 245AA HC 395 has come into force in May 2013, which replaces the policy. The evidence filed in a witness statement of Anna Middleton on behalf of the Secretary of State suggests that the policy has ceased to apply. The court did not permit the Secretary of State to adduce this evidence.

It is unclear what the exact position is regarding the existence or non-existence and application of the policy. The policy would still be relevant to those applications made and probably decided prior to the coming into force of para 245AA HC 395. In such appeals the Secretary of State may adduce the evidence rejected by the Court of Appeal.

Counsel is aware that very recently applicants have been sent letters indicating that if there is any problem with the validity of the application, such as missing documentation or omissions on the form, a caseworker will write to him or her as soon as possible to advise what action is needed to take to rectify the problem. However, in light of the Court of Appeal's judgment, these letters may not make much of a difference to the outcome of the case.

The court did not give an opinion on how para 245 AA HC 395 will operate. Applicants are best advised to fit their arguments around both the policy and para 245 AA where there is a shortfall of evidence.

The court did not rule out the application of the 'de minimis' rule in a future case where there was a shortfall of evidence provided with the application (where a person has substantially complied with a statutory (rule) duty a trivial divergence will be disregarded)--but decided that the 'near miss' approach will not assist an applicant given that the Immigration Rules are specific.

Are there any patterns or trends emerging in the law in this area?

The recent cases strongly suggest that the courts are reluctant to impose further obligations on the Secretary of State other than as set out in the Immigration Rules. The Immigration Rules make it clear that submission of the specified documents with the application is mandatory--if the specified documents are not produced with the application it will be refused.

Paragraph 245AA HC 395 goes some way to alleviate this difficulty on applicants. There is no unfairness in the Immigration Rules requiring an applicant to submit with his application all of the evidence necessary to demonstrate compliance with the rule under which he seeks leave to remain in the UK as a student. The price of securing consistency and predictability is a lack of flexibility that may well result in 'hard' decisions in individual cases, but that is not a justification for imposing an obligation on the Secretary of State to conduct speculative requests for further missing information from the applicant. The onus rests on the applicant to make sure that his or her application is correctly submitted in accordance with the rules.

The clear signal given in this case is that applicants must have a sure understanding of what their obligations are to submit documents and evidence under the relevant Immigration Rules. Missing information, such as that described in para 245AA HC 395, may be provided after the application has been submitted.

In future, where the rule states that specified documents must be provided, the Entry Clearance Officer, Immigration Officer or the Secretary of State will only consider documents that have been submitted with the application--and will only consider documents submitted after the application where the applicant has submitted specified documents in which some of the documents in a sequence have been omitted (for example, if one bank statement from a series is missing); or if a document is in the wrong format (for example, if a letter is not on letterhead paper as specified); or if a document is a copy and not an original document; or a document does not contain all of the specified information.

In such a situation the Entry Clearance Officer, Immigration Officer or the Secretary of State may contact the applicant or his representative in writing and request the correct documents. The requested documents must be received at the address specified in the request within seven working days of the date of the request. Documents will not be requested where a specified document has not been submitted (for example an English language certificate is missing), or where the Entry Clearance Officer, Immigration Officer or the Secretary of State does not anticipate that addressing the omission or error will lead to a grant because the application will be refused for other reasons (ie para 322 HC 395).

Ramby de Mello is an acknowledged and highly regarded practitioner in the field of human rights. He has represented clients in the Supreme Court, the ECJ and the Grand Chamber of the ECHR. He appears regularly in the UK courts in test cases involving human rights. Ramby and Abid Mahmood both represented the respondent, Rodriguez at appeal. Regarding the interview, Ramby wishes to thank Abid for his input.

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Interviewed by Kate Beaumont.

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