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R (on the application of Ganeshamoorthy) v Secretary of State for the Home Department (Evidential Flexibility; Administrative Review Gateways)

Case No: JR-2024-LON-002458

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

Hearing date: 29 April 2025
Promulgated: 30 June 2025

Before:

UPPER TRIBUNAL JUDGE BLUNDELL

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Between:

THE KING
on the application of
GAJANAN GANESHAMOORTHY

Applicant

- and -

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

- - - - - - - - - - - - - - - - - - -

Zane Malik KC
(instructed by KT Solicitors), for the applicant

Jennifer Thelen
(instructed by the Government Legal Department) for the respondent

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The Evidential Flexibility Policy, version 11 (January 2021)

1. *Version 11 of the Secretary of State's Evidential Flexibility policy ("EFP") applies to all routes under the Immigration Rules except Appendix FM and protection routes. It is no longer applicable only to cases under the Points-Based System.*

2. *Paragraph 245AA of the Immigration Rules continues to apply only to Points Based System applications.*

3. *Version 11 of the EFP and paragraph 245AA are no longer coterminous. The EFP applies to more types of applications. It contains no express reference to paragraph 245AA. The circumstances in which additional documents or information might be requested from an applicant are framed more widely in version 11 of the EFP than in paragraph 245AA of the Rules or in the previous versions of the policy considered in Mudiyanselage & Ors v SSHD [2018] EWCA Civ 65; [2018] Imm AR 846.*

4. *Unlike paragraph 245AA and version 8 of the EFP, the current version applies to documents which were omitted from an application.*

5. *Unlike version 8 of the EFP, the current version of the guidance does not require a caseworker to have reason to believe that missing information exists; a caseworker must also consider whether they believe that an applicant "could obtain" the missing document or information.*

Admission of Additional Evidence on Administrative Review

6. *Administrative review generally takes place on the basis of the evidence which was before the original decision maker. That basic rule is subject to five exceptions.*

7. *The first three, in paragraphs AR3.3(a)-(c), relate to situations in which the applicant is suspected of some sort of wrongdoing which has resulted in refusal under Part 9 of the Immigration Rules. Where the eligible decision was based wholly or partly on such a ground of refusal, additional evidence is admissible at Administrative Review, whether or not the eligible decision was incorrect.*

8. *Paragraph AR 3.3(d) permits the submission of additional evidence on Administrative Review where the original decision was one which included a decision not to request specified documents under paragraph 245AA of the Immigration Rules. An applicant is not additionally required to demonstrate that the decision not to request documents was erroneous or incorrect.*

9. *Paragraph AR3.3(e) permits the submission of additional evidence on Administrative Review where there was a substantive error in the respondent's decision not to follow the Evidential Flexibility policy.*

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J U D G M E N T

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Judge Blundell:

1. There are two principal issues in this case.

2. The first concerns the Secretary of State's *Evidential Flexibility* policy, which generated considerable litigation between 2011 and 2018. By 2018, the policy had been refined to the point that it added nothing to the Immigration Rules. The current version of the policy (version 11) is said by the applicant to be wider in scope than the Immigration Rules and its predecessors. There is no reported authority on this version of the policy, which was published in January 2021.

3. The second issue concerns the process of Administrative Review, as governed by Appendix AR of the Immigration Rules. Specifically, this case concerns the correct construction of paragraphs AR3.3(d) and (e), which provide "gateways" through which evidence which was not before the original decision maker might be admitted on Administrative Review. There is no reported authority on the current version of these Rules, which were introduced in April 2024.

Background

4. The applicant is a Sri Lankan national who is thirty five years old. On 29 March 2024, he made an application for entry clearance under Appendix Skilled Worker of the Immigration Rules. He wished to enter the United Kingdom so that he could work as a Retail Manager. He was sponsored by a limited company, which had provided a Certificate of Sponsorship ("CoS"). The letter which accompanied the application stated that the applicant's job was at the appropriate skill level and that he would be paid a salary of £28,000 per annum. It was submitted that the vacancy was a genuine one and that there were no adverse considerations which warranted refusal on suitability grounds.

5. The letter also stated that the applicant met the English Language requirement because he had "provided his IELTS test report (dated 22 March 2024) and [had] achieved a CEFR level B1 with an overall band score of 5.0", in accordance with the requirement in paragraph 7.1 of Appendix SW. The IELTS certificate was provided with the application.

6. I should mention two other aspects of the letter which accompanied the application. The first is that the applicant's solicitors expressly invited the Entry Clearance Officer to accept that the Immigration Rules which applied to the application were those which were in force before 4 April 2024. Reference was made in that connection to the transitional provisions in HC590.

7. The second point is that the applicant's solicitors invited the ECO to consider exercising her discretion outside the Immigration Rules in the event that the application was refused under the Rules. Relevant authority was cited and it was submitted that consideration outside the Rules was warranted because the applicant "will be providing much needed labour to the UK's economy which is now in recession – it is entirely in the public interest that he is granted permission to enter the UK."

The Entry Clearance Officer's Decision

8. The application was refused on 29 April 2024. This is the first decision under challenge in these proceedings. The relevant part of the decision is in the following terms:

> I have awarded you 0 points for the English language requirement because you have not demonstrated you have an English language ability of at least level B1 (intermediate) on the Common European Framework of Reference for language in all four components (reading, writing, speaking and listening). Appendix English language sets out how applicants can meet this requirement.
>
> In support of your application you submitted Non – UKVI ILETS [sic] Test Certificate. This is not an approved language test as set out in Appendix English language and therefore cannot be used to demonstrate you meet the requirement.
>
> I have considered whether to give you an opportunity to provide further evidence to demonstrate you do meet the English language requirement. The evidential flexibility guidance states the burden of proof is [sic] the applicant to evidence that they meet the requirements of the Rules and that evidential flexibility does not need to be exercised if the submitted evidence does not meet the requirements. Therefore, I am satisfied that the submitted evidence is inadequate because the test you sat does not meet the requirements of Appendix English language and I am not exercising Evidential Flexibility.
>
> I therefore refuse your application.

9. The applicant was informed that he was entitled to seek Administrative Review of the ECO's decision within 28 days. On 23 May 2024, he did so. The application was accompanied by submissions from his solicitors, a short witness statement from the applicant, and a new IELTS certificate dated 9 May 2024. It was submitted that the respondent had erred in failing to apply the Evidential Flexibility policy and that she should consider the new certificate, which complied with the requirements of the Immigration Rules because it contained a verifiable UKVI number.

10. In his statement, the applicant said that he had booked the IELTS for UKVI B1 General Test but that the centre had decided to change the test at the last minute, which was why he had originally submitted an IELTS certificate which did not meet the requirements of the Immigration Rules. He apologised for his error and asked the reviewer to take account of the new certificate. He pointed out that he would be in difficulty if he had to make a new application for entry clearance because the Rules had changed on 4 April 2024 and the minimum salary requirement had increased significantly.

The Administrative Review Decision

11. The respondent refused the Administrative Review on 13 June 2024. This is the second decision under challenge in these proceedings. Under the sub-heading "Claimed error in the assessment of evidence", the respondent made reference to the original refusal and to the applicant's submissions before stating:

> The ECO did not apply evidential flexibility as the evidential flexibility guidance states the burden of proof is on the applicant to evidence that they meet the requirements of the Immigration Rules, and that evidential flexibility does not need to be exercised if the submitted evidence does not meet the requirements. As the English language test certificate, you supplied could not be verified using the IELTS online checking system, the ECO refused your application. As a Skilled Worker you would have been required to undertake the IELTS for UKVI test which would have contained a specific UKVI reference number to allow verification checks to be conducted. https://takeielts.britishcouncil.org/uk/ukvi
>
> Within your AR you indicate that you should have been given the chance by the ECO to provide further evidence that you met the English language requirements, however we are satisfied that the ECO was reasonable not to apply evidential flexibility to contact
> you to request that you provide additional evidence as it was not apparent that you had made a mistake or had omitted any evidence from your application.
>
> It is also noted that you have provided an IELTS Test Report Form in your name dated 09 May 2024 with UKVI Number IEL/09052024/LK001/001249, however this evidence was not available at the time for consideration by the ECO.
>
> Upon review, we are satisfied that the ECO was reasonable to refuse your application for the reasons stated in their refusal decision under paragraphs SW 4.1, SW 7.1, SW 7.2, and SW 7.3, with reference to Appendix English language of the Immigration Rules.

12. The decision continued, under the sub-heading "Rejection of fresh evidence", as follows:

> Your application was considered and decided on the basis of the evidence available on the date the decision was made. We will not consider new evidence or information when reconsidering a decision that was provided after that decision has been taken, unless it meets the requirements specified in Appendix AR of the Immigration Rules.
>
> It is your responsibility to ensure that all appropriate evidence is submitted with the application for entry clearance.
>
> The IELTS Test Report Form in your name dated 09 May 2024 with UKVI Number IEL/09052024/LK001/001249 that you have provided with this reconsideration application was not sent with the original application. It is therefore not eligible for consideration because it is not evidence that:
>
> - was supplied previously but was not considered or considered incorrectly
> - seeks to prove that documents we assessed to be false were, in fact, genuine
> - seeks to prove the date of the previous application.
>
> The AR of your case has confirmed that the application was considered and assessed in accordance with the correct rules, policy, and guidance. You applied for entry clearance under the Skilled Worker route and the application was therefore assessed under Appendix Skilled Worker with reference to Appendix English Language of the Immigration Rules. Under those rules, you were required to demonstrate that you met the relevant requirements. As stated in the original refusal decision letter, you failed to demonstrate that you met these requirements. Therefore, we have maintained the original decision.

Application for Judicial Review

13. Pre-action communications proved unfruitful and this claim was issued on 12 September 2024. Mr Malik KC advanced three concise grounds:

    (i) The ECO misconstrued Paragraph AR3.3 of the Immigration Rules in declining to consider the IELTS for UKVI certificate submitted with the application for administrative review.

    (ii) The ECO failed to follow the Evidential Flexibility policy in refusing to invite the Applicant to provide the missing IELTS for UKVI certificate when refusing his underlying application.

    (iii) The ECO acted unlawfully in failing to consider departing from the Immigration Rules in the exercise of her residual discretion.

14. Permission was granted on the papers by UTJ Hirst, who considered each of the grounds to be arguable.

Submissions

15. In his written and oral submissions, Mr Malik made the following submissions on the grounds.

16. The first ground was not about paragraph 245AA of the Immigration Rules or about the Evidential Flexibility Policy; it was about submitting new evidence with an application for Administrative Review. The proper approach to the construction of the Immigration Rules was as set out in R (Wang) v SSHD [2023] UKSC 21; [2023] 1 WLR 2125 and Mahad v ECO [2009] UKSC 16; [2010] 1 WLR 48. It was also relevant to recall what Lord Brown had said in Mahad about the Secretary of State using express language to exclude third party support; the tribunal was invited to deploy the same tool in this case.

17. There could be no doubt that Appendix AR applied to applications which had been made under Appendix SW. Paragraph AR3.1 contained the test which the decision maker was to apply. The test was whether the decision was incorrect for one of the reasons given; not whether the decision was unreasonable in a public law sense. The difficulty in the instant case was that the decision maker had misunderstood the gateway at AR3.3. The approach in the AR decision bore little if any resemblance to the approach required by the Rules. That error was material because the original decision was of the kind specified in AR3.3(d) or (e).

18. The Detailed Grounds of Defence were wrong to submit that the ECO's decision was not "a decision not to request specified documents under paragraph 245AA of these rules". There had evidently been such a decision in this case, and paragraph AR3.3(d) applied. Paragraph AR3.3(e) was badly expressed but it also applied here, because the respondent had failed to follow the published Evidential Flexibility policy.

19. In relation to ground two, Mr Malik submitted that it was trite that the respondent was obliged to follow her published policies, and that she had failed to follow the Evidential Flexibility policy in this case. It was for the Tribunal to decide the meaning of a published policy. There had been a clear change in that policy since the leading case of Mudiyanselage & Ors v SSHD [2018] EWCA Civ 65; [2018] 4 WLR 55 was decided, although what was said about the definition of a specified document must still apply. The decision maker's approach in the instant case was flatly at odds with what was said by Underhill LJ at [58]; the fact that the UKVI reference number was missing from the IELTS certificate evidently did not "affect the fundamental character of the document."

20. The current version of the policy replaced all previous instructions and contained what Mr Malik described as a "remarkable and conspicuous development", in that the policy now applied where a person had "omitted supporting evidence". In contrast to the previous versions of the policy, it did not merely apply if the

decision maker believed the applicant to have omitted supporting evidence which they had; it also applied where they believed that the applicant could obtain that evidence. The respondent had clearly erred in failing to apply the policy. Junied v SSHD [2019] EWCA Civ 2293; [2020] 4 WLR 18, on which Ms Thelen was to rely, was of no assistance, since that was not a case which concerned Evidential Flexibility.

21. As for ground three, the respondent had erred in failing to consider whether to exercise her discretion outside the Rules. There had been a clear and particularised request for her to do so and she was obliged to turn her mind to that request: R (Behary & Anor) v SSHD [2016] EWCA Civ 702; [2016] 4 WLR 136, at [39]. She had failed to do so in either decision and this was the paradigm case for a grant of leave outside the Rules. No submission under s31(2A) of the Senior Courts Act 1981 had been made by the Secretary of State thus far.

22. Ms Thelen developed her Detailed Grounds of Defence and skeleton argument with reference to three key points. She submitted that paragraph 245AA did not apply; that the Evidential Flexibility policy did not apply; and that the applicant was not entitled to submit additional evidence through the limited gateway provided by paragraph AR3.3.

23. In relation to paragraph 245AA, Ms Thelen submitted that this was not a case in which an inadequate or deficient specified document had been submitted. The IELTS certificate which was submitted was simply the wrong document; it did not contain the valid digital reference required by paragraph EL6.1. The importance of that reference was clear and obvious. It enabled the decision maker to verify the test online. It was apparent from the documents that the UKVI test was different from the general test. No evidence existed that the applicant had passed the UKVI version of the test at the date of the original decision because he had not even taken that test. Ms Thelen submitted that there was a "set process which had not been followed" in this case. The applicant did not seek to remedy a minor defect in his application. That was the intention of paragraph 245AA.

24. The Evidential Flexibility policy had no application in a case such as this, in which the applicant had simply submitted the wrong document. The applicant was wrong to suggest that there had been a sea change in the policy. The policy still applied to documents which a person was thought to have, or which they could obtain. There was no reason to think that the applicant could have obtained the IELTS UKVI certificate as he had not booked or taken the test. The policy was clear in relation to evidence which was simply missing and the examples which were given were instructive. The policy did not require the ECO to engage in a "theoretical exercise" as to whether documents could be obtained within a reasonable space of time. An applicant was generally required to submit new evidence within ten days, whereas it had taken the applicant more than three weeks to obtain the UKVI certificate.

25. Ms Thelen submitted that the important points made about certainty and predictability in Mudiyanselage continued to apply. The example given by Underhill LJ about a person who had submitted an MA certificate when a PhD was required was of assistance. Also of assistance were dicta at [70], [76] and [80].

26. In sum, this was not a case in which AR3.3 could apply. Paragraph 245AA was of no application. Whilst AR3.3(e) was poorly expressed, it was equally clear that this was not a case to which the policy applied. There was no error in the decision not to request additional evidence or to refuse to admit further evidence at the Administrative Review. The way in which that decision was expressed was not precise but the fact was that the gateway did not apply in a "wrong document" case such as this.

27. In relation to the third ground, it was accepted that the respondent had erred in failing to consider the exercise of her discretion outside the Rules but there was no proper basis for a grant of leave to remain outside the Rules. The policy in the Rules was clear and had a logical basis and there was no reason to depart from it. Relief should be refused under s31(2A) SCA 1981 as a result.

28. In reply, Mr Malik submitted that Ms Thelen's submissions represented no answer to the claim. On the current version of the Evidential Flexibility policy, it was immaterial that the applicant had submitted the wrong document, just as it was immaterial that the error was not a minor one or that the correct document did not exist. That was apparent from the plain wording of the policy itself. The Secretary of State's submissions amounted to an attempt to rewrite the policy, and to re-introduce aspects of it which had been removed.

29. The applicant's error in submitting the basic IELTS test rather than the UKVI version was not so wholesale as to affect the fundamental character of the document. The applicant was required to achieve level B1 CEFR and he had done so in the first test, just as he had in the second. All that was missing from the first was the UKVI reference number. Whilst the applicant had legal advice at that time, it was also relevant to note that the application form did not specifically ask for the UKVI reference number.

30. Mr Malik submitted that the respondent was wrong to suggest in response to the first ground that there had been no decision under paragraph 245AA. The respondent had self-evidently decided not to request specified documents and AR3.3(d) was engaged. It was accepted by Ms Thelen that AR3.3(e) of the Immigration Rules was poorly drafted. On its proper construction, it must mean "a decision not to request documents under the Evidential Flexibility policy". Such a construction would be coherent and consistent with AR3.3(d).

31. As for the second ground, the differences between version 8 of the policy – as considered in Mudiyanselage – and the current version were stark. The current version provided for the submission of specified documents which had been omitted and instructed caseworkers that they must not refuse if a specified document had not been provided. The approach adopted by the respondent in this case would defeat the purpose of the policy as currently framed.

32. As for ground three, it was plain that the respondent was under an obligation to consider the case outside the Rules. Applying the correct approach to s31(2A) SCA 1981, the tribunal could not be satisfied that it was highly likely that the outcome for the applicant would not have been substantially different if the discretion had been considered. The tribunal was not the primary decision maker. There was no witness statement from the respondent. The respondent's submission did not deal with the critical point, which was that the applicant's English language proficiency was demonstrably at the required level from the outset.

33. At the end of the submissions, I reserved judgment and considered three points with counsel. Firstly, the authorities bundle did not contain the Immigration Rules which applied to this applicant's case. Ms Thelen confirmed that the relevant Rules could be provided swiftly and in agreed form. I asked whether I was to be informed about the difference, if any, between the IELTS test and its UKVI version. Thirdly, I asked whether further clarification could be provided about the guidance provided to an applicant about the nature of the English language test they were required to take. Counsel agreed to consider those questions and to provide a note.

34. Shortly after the hearing, I was provided with an agreed version of the relevant Immigration Rules and a short, agreed note setting out additional submissions on the third question. Counsel confirmed that they did not propose to make any additional submissions in relation to the second point, which they invited me to consider on the evidence before me.

35. I am grateful to Mr Malik and Ms Thelen for their assistance.

The Immigration Rules

36. The relevant sections of the Immigration Rules are lengthy and complex but it is only necessary to make reference to those parts which are directly relevant to the decisions under challenge and the grounds for judicial review.

Appendix SW

37. It is common ground that the version of Appendix SW with which I am concerned is that which was in force on 3 April 2024. The relevant provisions were filed by Ms Thelen, at my request, shortly after the hearing.

38. It is not necessary to set out in full the English language requirements in that appendix. They appear at paragraphs SW 7.1-7.3. It suffices to note that an applicant must establish English language competence of at least level B1 on the Common European Framework of Reference for Languages. That must be done by meeting the relevant requirement in Appendix English Language.

Appendix English Language

39. Paragraph EL 6.1 of Appendix English Language provided as follows on 3 April 2024:

> EL 6.1. An applicant will meet the English language requirement if they have provided a valid digital reference number from an approved provider showing they have passed an approved English language test to the required level in the two years before the date of application.
>
> The list of approved tests and providers, updated from time to time, can be found at [hyperlink omitted]

Paragraph 245AA

40. Paragraph 245AA appears at the start of Part 6A of the Rules: the Points Based System. The paragraph concerns "Documents not submitted with applications" under the PBS. It was introduced into the Immigration Rules on 6 September 2012 and has since 5 November 2018 provided as follows:

> (a) Subject to sub-paragraph (b) and where otherwise indicated, where Part 6A or any appendices referred to in Part 6A state that specified documents must be provided, the decision maker (that is the Entry Clearance Officer, Immigration Officer or the Secretary of State) will only consider documents received by the Home Office before the date on which the application is considered.
>
> (b) If the applicant has submitted the specified documents and:
> (i) specified evidence is missing from the documents; or
> (ii) a document is in the wrong format (for example, if a letter is not on letterhead paper as specified); or
> (iii) DELETED
> (iv) a document does not contain all of the specified information;
> the decision maker 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 10 working days of the date of the request.
>
> (c) Documents will not be requested where the decision maker does not think that the submission of missing or correct documents will lead to a grant because the application will be refused for other reasons.

(d) If the applicant has omitted to provide specified evidence, or submitted it in the wrong format, but the missing information is verifiable from other documents provided with the application or elsewhere, the decision maker may grant the application despite the error or omission, if they are satisfied that the applicant meets all the other requirements of the Rules.

Appendix Administrative Review

41. This appendix was inserted into the Rules on 20 October 2014. The current version was substituted with immediate effect on 4 April 2024. The appendix makes provision for the submission and consideration of applications for Administrative Review. It begins by stating that Administrative Review "is the review of an eligible decision, the purpose of which is to decide whether the decision was wrong due to a case working error."

42. The only part to which I need refer is AR3, which is titled "Consideration of application for Administrative Review":

> AR 3.1. The decision maker conducting the administrative review ("the reviewer") will decide whether the eligible decision is incorrect because:
> (a) the decision maker of the eligible decision failed to apply, or incorrectly applied, the relevant Immigration Rules; or
> (b) the decision maker of the eligible decision failed to apply, or incorrectly applied, published guidance.
>
> AR 3.2. The reviewer will consider whether the applicant for administrative review is entitled to entry clearance or permission on the basis of the original application and will not consider whether the applicant is entitled to entry clearance or permission on any other basis.
>
> AR 3.3. Where evidence which was not before the original decision maker is submitted with the application for administrative review, the reviewer will only consider that evidence where the eligible decision was:
> (a) a decision under Part 9 of these rules to refuse an application on the grounds of false representations or deception; or
> (b) a decision under Part 9 of these rules, to cancel entry clearance, permission to enter or permission to stay on the grounds of false representations or deception; or;
> (c) a decision to refuse an application for entry clearance under Part 9 of these rules on the grounds of a previous breach of immigration laws; or
> (d) a decision not to request specified documents under paragraph 245AA of these rules; or
> (e) a failure to follow the evidential flexibility policy published on gov.uk.
>
> AR 3.4. Where evidence would be admissible under AR 3.3, the reviewer may contact the applicant to request further information and specify a reasonable timeframe for receipt of that information.

> AR 3.5. Where the requested information is not provided within the timeframe specified, the reviewer may consider the administrative review on the available information.

The Evidential Flexibility Policy

43. This policy is now in its eleventh iteration, which was published on 15 January 2021 and has therefore applied at all stages of the applicant's case. It applies to all applications except those under Appendix FM and Part 11 of the Immigration Rules. It also does not apply where it is suspected that false information or false documents have been submitted.

44. The relevant part of the policy is entitled "When to apply evidential flexibility". It provides as follows:

> The requirements for each route, including how to prove the requirement is met, is set out in the Immigration Rules and accompanying guidance. The 'document checklist' shared with an applicant when they complete an online application also sets out what evidence they should submit in support of their application. Applicants should provide all information and evidence on which they rely to support their application as part of the application process.
>
> The burden of proof is on the applicant to show that they meet the eligibility requirements of the Rules. The standard of proof is the balance of probabilities (i.e. it is more likely than not that a requirement is met). When applying the suitability requirements the burden of proof sometimes shifts to the Home Office: see suitability guidance for more information.
>
> When you are considering the application, if it appears that the applicant has made an error with, or omitted, supporting evidence, or further information or verification of evidence is needed to make a decision, you should normally provide an opportunity for the additional information to be provided. For example, you should consider contacting the applicant:
>
> - if evidence is missing that you believe the applicant has, or could obtain
> - if evidence is inadequate but could be further clarified – for example, if an employer's letter has been provided but it is missing relevant information, for example, it does not confirm the applicant's gross annual salary
>
> You may decide to ask for further information from the applicant, the sponsor, or the awarding body or other organisation to which the information relates. You may also decide to make verification checks of the evidence provided if you think that would help you assess whether the applicant meets the requirements of the route under which they are applying. If you are not sure whether the additional information or verification checks would help, please discuss this with your senior case worker or an appropriate manager.

> You must not refuse an application because the applicant has not provided a specific document if the applicant was not asked to provide that specific document. If it is necessary for you to see the specific document in order to decide whether the requirements of the Rules are met, you must first give the applicant the opportunity to provide that document.
>
> You do not need to contact the applicant if evidence is missing or inadequate if you can find the relevant information elsewhere. For example, information may be accessible to you on the case work systems, such as from the Confirmation for Acceptance of Studies (CAS) or from a previous application. You are not required to review all documents held on a person just in case the information could be found there.
>
> You do not need to contact the applicant, or third party (e.g. the sponsor for the applicant's job or the student sponsor), if evidence is missing or inadequate if receiving it would make no difference to your decision, for example, because the application would still be refused on other grounds, for example not meeting another eligibility requirement or on suitability grounds. Suitability: false representations, deception, false documents, non disclosure of relevant facts.
>
> If evidence is missing or inadequate, you do not have to offer the applicant an opportunity to prove they meet the requirement in a different way. You do not have to contact them to see if they want to rely on other evidence to show they meet the requirements.
>
> For example:
>
> - if the applicant says they are relying on a student loan, but the evidence is not sufficient to show the requirement is met, you do not need to check whether the applicant meets the requirement some other way such as asking for bank statement
> - if the applicant provides bank statements and they do not show the required level of funds or the evidence is not sufficient to satisfy you, there is no need to check whether the applicant has another bank account that might meet the requirement.

45. For reasons which will shortly become clear, it is also necessary to set out the corresponding part of version 8 of the policy. That was published on 24 November 2016 and was entitled *Evidential flexibility: points-based system*. Page 4 of that policy had a sub-title "When evidential flexibility applies in PBS applications", under which there appeared the following instructions:

> The requirements of each PBS route, including the evidence which must be submitted, are set out in the Immigration Rules. This means applicants should provide all information and evidence on which they rely to support their application at the outset of the process. However, it is recognised that if an applicant makes a minor error or omission with the supporting evidence they provide, then in some circumstances it may be appropriate to

contact them and invite them to provide additional information. Guidance on how to consider applications submitted prior to 24 November 2016 can be found in the guidance archive on Horizon.

The circumstances when a decision maker can request additional information are set out in the evidential flexibility rule in paragraph 245AA in part 6A of the Immigration Rules.

Paragraph 245AA only applies to specified documents. Specified documents are route specific and are documents the applicant has to provide in order to meet the requirements of the Rules. A request for further information can only be made under evidential flexibility when the applicant has made a valid application.

Additional information can only be requested once and only in the specific circumstances set out in paragraph 245AA(b). These are where:

- documents (for example bank statements) are missing from a sequence – for the definition of this see 'Documents missing from a sequence'
- a document has been submitted but is in the wrong format, for example, where a document contains all of the substantive information required by the Immigration Rules but should have been submitted on letterheaded paper
- the document submitted with the application is a copy and an original document is required
- a document does not contain all of the specified information – for example, if an employer's letter has been provided that does not confirm the applicant's gross annual salary or that the employer needs to employ the applicant in their current role for the foreseeable future

If a specified document does not include all the specified information, you do not need to write to an application where the missing specified information can be obtained from one of the following:

- other documents submitted with the application
- the website of the organisation which issued the document
- the website of the appropriate regulatory body, for example, the Financial Conduct Authority

You must only request additional information under paragraph 245AA if you have reason to believe the information exists and that the applicant would meet the requirements of the Immigration Rules if they were given a further opportunity to provide that information. If the application falls for refusal for a reason which could not be addressed by requesting additional information, for example, under general grounds for refusal then you must not request further evidence under paragraph 245AA. If you are unsure, you must discuss this with your senior case worker or line manager.
If you decide that evidential flexibility does not apply to the case you must accurately and fully record on either CID or Proviso:

- whether evidential flexibility applies

- if it does why no request for further information has been made

You must explain fully in the decision letter why no request for further information has been made. Suggested wording for your decision letter can be found in the deciding the case section of this guidance.

Analysis

46. The proper approach to considering the meaning of the Immigration Rules and the respondent's published policies is settled and it is not necessary to make extensive reference to authority.

47. In relation to the Rules, the decision of the Supreme Court in R (Wang) v SSHD recalled Lord Brown's judgment in Mahad v ECO, including his injunction to construe the Rules "sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy."

48. In relation to published policies, the *locus classicus* remains what was said by Lord Reed in Tesco Stores v Dundee City Council [2012] UKSC 13; [2012] PTSR 983, at [18] in particular: "policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context." I have also been assisted by, but need not rehearse, the recent and comprehensive review of the relevant principles in R (Gurung) v SSHD (ACRS meaning - policy interpretation principles) [2025] UKUT 90 (IAC).

49. I will consider the grounds in what I consider to be the most logical order. That order is chronological, beginning with the respondent's approach to the Evidential Flexibility policy in the original decision (ground two) and the failure to consider the case outside the Immigration Rules (ground three), then moving on to consider the challenge made to the refusal to consider additional evidence in the Administrative Review (ground one).

Ground Two – Evidential Flexibility

50. I have set out the relevant parts of the Immigration Rules and the relevant sections of versions 8 and 11 of the Evidential Flexibility policy. In order to consider Mr Malik's first ground, it is also necessary to refer to an authority.

Mudiyanselage & Ors v SSHD

51. The most significant authority on the Evidential Flexibility policy is Mudiyanselage & Ors v SSHD, to which there was extensive reference in the submissions before me. The only full judgment was given by Underhill LJ. Sir Brian Leveson P gave a very short judgment of his own. Sir Colin Rimer agreed.

52. At [7], Underhill LJ recalled that "evidential flexibility" entered the lexicon of immigration jargon in 2009, when the Secretary of State issued a "process instruction" giving guidance to caseworkers about the circumstances in which they might show a degree of flexibility in the consideration of non-compliant applications under the Points Based System. As Underhill LJ went on to explain in the same paragraph, the respondent first published formal guidance on the subject in March 2013: *Points-based system - Evidential Flexibility*.

53. In the meantime, the Secretary of State had also decided that the issue should be covered in the Immigration Rules, and paragraph 245AA was inserted on 6 September 2012. By the time the Court of Appeal came to consider the linked appeals in Mudiyanselage in early November 2017, the Evidential Flexibility policy was in its eighth iteration and paragraph 245AA had also been the subject of various amendments.

54. Underhill LJ charted the various versions of paragraph 245AA and the policy at [12]-[22] and [23]-[35] of his judgment. In the course of that analysis, he observed that one of the key differences between the original and later versions of the policy was that the later versions contained a consistent element:

> "that caseworkers should only ask for further information in a case falling under paragraph 245AA(b) where there is in fact reason to believe that the missing document or information exists"

55. Then, at [36]-[51], Underhill LJ reviewed the authorities on the Points Based System and the Evidential Flexibility policy in its various guises. I need not repeat that exercise. What matters for present purposes is the conclusion reached about the eventual convergence of the policy and the Immigration Rules.

56. At [52], Underhill LJ noted that the language of the policy had changed since Mandalia v SSHD [2015] UKSC 59; [2015] 1 WLR 4546 and SH (Pakistan) v SSHD [2016] EWCA Civ 426 had been decided. In the latter case, he explained, it was the specific terms of the policy as then in force which created "an obligation on the Secretary of State to exercise evidential flexibility in some circumstances which [paragraph 245AA] did not cover." But, said Underhill LJ, the language which was decisive in those cases had changed, starting with version 2 of the guidance.

57. At [53], Underhill LJ held that the later versions of the policy were "indistinguishable from those of paragraph 245AA itself". At [54], he held that the correct construction of versions 4-7 of the policy was that there was "no longer a general policy to allow correction of minor errors: evidential flexibility will only apply in the particular cases provided for by paragraph 245AA."

58. Underhill LJ then held that the previous "mismatch" (between the Rule and the policy) no longer existed. He suspected that it was "always unintentional" and that it was simply the result of incompetence. He added that it was not the first

time that such mistakes had occurred in the department: "the web of Rules and Guidance has become so tangled that even the spider has difficulty controlling it." At [55], Underhill LJ noted that versions 4-8 of the policy mirrored the requirements in paragraph 245AA.

59. At [56], Underhill LJ summarised the effect of his conclusions in this way:

> [56] As I have acknowledged, the fact that the scope of the EFP is now much more limited than originally increases the scope for harsh outcomes—that is, for cases where a PBS application fails because of a minor error or omission which could have been rectified if the applicant was notified of it but which does not fall into one of the specific categories identified at paragraph 245AA (b) . There may be very particular cases where such an outcome can be avoided by the application of the common law duty of fairness; but I agree with Beatson LJ in *SH (Pakistan)* that the effect of that duty is constrained by the context of the PBS as expounded in the various authorities reviewed above. The clear message of those authorities, including *Mandalia* , is that occasional harsh outcomes are a price that has to be paid for the perceived advantages of the PBS process. It is important not to lose sight of the fact that the responsibility is on applicants to ensure that the letter of the requirements of the PBS is observed: though that may sometimes require a good deal of care and attention to detail, because of the regrettable complexity of the Rules, it will normally be possible to get it right.

60. At [57]-[59], under the sub-heading "When is a specified document not a specified document?", Underhill LJ identified and resolved a logical problem with the Secretary of State's case. For reasons which will become apparent, it is also necessary to set out the first two paragraphs in full:

> [57] I should deal at this stage with one particular issue about paragraph 245AA which arises in both *Khan* and *Negbenebor* . It is clear both from the introductory words of sub-paragraph (b) and from the first sentence of sub-paragraph (c) that paragraph 245AA is intended to operate only where the applicant has submitted a specified document: what sub-paragraph (b) does is to give the applicant the opportunity to correct errors of the defined kinds in a specified document which has been submitted. But that leads to a logical problem. Mr Malik—who principally argued this point for the Secretary of State—contended that a document which fails to comply with the various requirements contained in the relevant SD paragraph (or equivalent), or indeed with paragraph 39B(d) (originals not copies), cannot be a specified document at all, with the result that the conditions for the operation of paragraph 245AA would not arise.
>
> [58] Logical as such a submission might appear if viewed in isolation, it plainly cannot be correct in the context of paragraph 245AA , since if it were accepted there would be no scope for the operation of sub-paragraphs (b) or (d). It is easy enough to resolve the conundrum as regards heads (i)–(iii) under sub-paragraph (b) (and heads (i) and (ii) under sub-paragraph (d)): the draftsman plainly intended that what was submitted as a specified document but which was in the wrong format, or was a copy instead of an

> original, would count as a specified document for the purpose of the paragraph—in this context "specified document" means "purported specified document". It is not quite so easy as regards head (iv) under sub-paragraph (b) (and head (iii) under sub-paragraph (d))—that is, where the defect is that the document "does not contain all of the specified information". Identifying exactly what that phrase is intended to cover needs some unpacking. It cannot have been intended that a document that simply showed none of the specified information at all would be covered by the rule. If, to take an extreme example by way of illustration, the requirement were that the document showed that an applicant had a PhD but what was submitted showed instead that he or she had only an MA, that could not sensibly be described as a case where the document "did not contain all of the required information": it did not contain the essential information required and would simply be the wrong document. That is common sense, but it is reinforced by the phraseology of "not … *all of* the specified information". It is accordingly, I believe, necessary to distinguish between, on the one hand, cases where the information which is missing is so wholesale as to affect the fundamental character of the document and, on the other, cases where it is secondary, so that it makes sense to say that the document is still of the kind specified albeit that it does not contain the particular information in question. Such a distinction seems to me to reflect the underlying policy behind the rule, as reflected in the reference in the introductory section of the Guidance to "minor errors". [emphasis added]

Alignment of Paragraph 245AA and version 11 of the Evidential Flexibility policy

61. Mr Malik submitted that paragraph 245AA and the current version of the Evidential Flexibility policy are no longer aligned in the way that they were when Mudiyanselage was decided. I agree, for the following reasons.

62. Version 8 of the policy, an excerpt from which is at [45] above, made extensive reference to paragraph 245AA, which it described as the "evidential flexibility rule". That version of the policy stated clearly that additional information could *only* be requested "in the specific circumstances set out in paragraph 245AA(b)." In the current version of the policy, there is no reference to paragraph 245AA, and no suggestion that the policy is intended to be nothing more than coterminous with the Rule.

63. The reason for the lack of reference to paragraph 245AA is clear when one considers the titles of version 8 and version 11. Version 8 is entitled *Evidential Flexibility: points-based system*, whereas version 11 is simply *Evidential flexibility*.

64. As I have already mentioned, version 11 states at the outset that it applies to "all routes except Appendix FM and protection routes." It is therefore unsurprising that there is no reference to paragraph 245AA. That paragraph of the Immigration Rules applies only to applications under the Points Based System, whereas version 11 of the policy applies more widely. It might have been better to make that clearer by making the current version of the policy version 1, since

it is in truth a document of much wider application than its supposed predecessor.

65. Paragraph 245AA(b) continues to apply only to cases in which an applicant has submitted the specified documents but there is a specific problem with those documents. The list of scenarios given in that paragraph is clearly intended to be exhaustive. There is a discretion (as indicated by the word "may") to contact the applicant or his representatives in limited circumstances but it does not extend to cases in which the wrong document was supplied. The current version of the policy is not so constrained. As Mr Malik noted, it extends to a case in which an applicant has "made an error with, or omitted, supporting evidence".

66. The discretion to contact an applicant is not expressed in the same permissive terms as paragraph 245AA(b). Whereas the rule provides that a decision maker "may" contact an applicant in limited circumstances, the policy provides that the decision maker "should normally provide an opportunity for the additional information to be provided."

67. It is clear, therefore, that paragraph 245AA and the Evidential Flexibility policy are no longer aligned in the way that they were when Mudiyanselage & Ors v SSHD was decided in 2018.

Differences Between v8 and v11 of the Evidential Flexibility Policy

68. As Mr Malik submitted, there are also striking differences between the current version of the policy and version 8, as considered in Mudiyanselage. I have set out the relevant sections of version 8 of the policy and the current version at [44]-[45] above in order to inform the comparison which follows.

69. In common with paragraph 245AA of the Rules, Version 8 and its predecessors made extensive reference to "specified documents", which is a term specifically defined at paragraph 39B of the Immigration Rules. The current version of the policy makes no reference to that term. It refers on occasion to "specific documents" and also to "supporting documents" but neither of those terms has any specific meaning in the Immigration Rules. As a result, the logical conundrum which Underhill considered at [57]-[58] of Mudiyanselage (as set out above) continues to apply in relation to paragraph 245AA but is not relevant to the Evidential Flexibility policy in its current form.

70. Version 8 of the policy made reference to the correction of a "*minor* error or omission", whereas that adjective is altogether absent from the current version of the policy.

71. Version 8 of the policy – like paragraph 245AA of the Rules – applied only to very specific types of missing information: documents missing from a sequence, documents in the wrong format, documents which were copies rather than

originals, and documents which did not contain all the specified information. The current version of the policy is cast in much wider terms, and applies where an applicant has made an error with or omitted supporting evidence.

72. Version 8 of the policy provided caseworkers with a discretion to request additional information in very limited circumstances, whereas the current version of the policy states that an opportunity to provide further evidence "should normally' be given in the circumstances described.

73. As Underhill LJ noted in Mudiyanselage, version 8 of the policy stated that caseworkers might only request additional information where they had "reason to believe the information exists". The current guidance is not so restrictive, stating that caseworkers should consider contacting the applicant "if evidence is missing that you believe the applicant has, *or could obtain*".

No Points Based System Context

74. The fact that the policy now applies outside the Points Based System must mean that much of the reasoning which informed the conclusion in Mudiyanselage no longer applies. The consideration of the policy in that case, and in the others cited by Underhill LJ, was informed by the fact that it applied specifically to applications under the PBS, which "puts a premium on predictability and certainty at the expense of discretion" and is intended to operate in a way which is "simple, predictable and expeditious": Alam & Ors v SSHD [2012] EWCA Civ 960; [2012] Imm AR 974, Nyasulu v SSHD [2016] EWCA Civ 1145 and R (Junied) v SSHD [2019] EWCA Civ 2293; [2020] 4 WLR 18.

75. I am not considering a policy which applies in that strict context, but to a wide variety of applications in different categories under the Rules. Version 11 of the policy applies equally to a visiting organ donor who omits medical practitioner confirmation of the date of the planned organ transplant (Appendix V8.3 refers) or a VIP Delegate who omits a Note Verbale which includes his details (Appendix DEL 2.2 and 4 refer) as it does to a skilled worker who omits a valid digital reference number from an approved provider showing they have passed an approved English language test. There is no attempt in the policy to apply different tests or standards in these two contexts; it adopts a 'one size fits all' approach to evidential flexibility.

76. For these reasons, I reach the following conclusions on the current version of the Evidential Flexibility policy:

    (i) Version 11 of the Secretary of State's Evidential Flexibility policy ("EFP") applies to all routes under the Immigration Rules except Appendix FM and protection routes. It is no longer applicable only to cases under the Points-Based System.

(ii) Paragraph 245AA of the Immigration Rules continues to apply only to Points Based System applications.

(iii) Version 11 of the EFP and paragraph 245AA are no longer coterminous. The EFP applies to more types of applications. It contains no express reference to paragraph 245AA. The circumstances in which additional documents or information might be requested from an applicant are framed more widely in version 11 of the EFP than in paragraph 245AA of the Rules or in the previous versions of the policy considered in Mudiyanselage & Ors v SSHD.

(iv) Unlike paragraph 245AA and version 8 of the EFP, the current version applies to documents which were omitted from an application.

(v) Unlike version 8 of the EFP, the current version of the guidance does not require a caseworker to have reason to believe that missing information exists; a caseworker must also consider whether they believe that an applicant "could obtain" the missing document or information.

77. With those undoubtedly overlong observations on the policy in mind, I turn to address ground one. In considering that ground, and the case as a whole, it is important to emphasise one point about the requirements which the applicant was required to meet and the evidence which he submitted to the ECO. The Immigration Rules and the guidance given to the applicant via a hyperlink in the application form (as provided, at my request, after the hearing) made it clear that the English language requirement is met by the submission of the UKVI reference number, and not by the submission of a certificate. The guidance, entitled *Prove your English language with a secure English language test*, states in terms that an applicant need not submit any documentary evidence as part of their application. In providing the IELTS certificate with his application, therefore, the applicant failed to meet the requirement in paragraph EL 6.1 of the Rules, and failed to provide a specified document which he was asked to provide. The question is whether the Evidential Flexibility policy applied, so as to require the ECO to offer him an opportunity to remedy that defect.

78. I have set out at [8] above the full reasons given by the ECO for deciding not to "exercise" Evidential Flexibility. It is difficult to see how the reasons given by the ECO relate in any way to the current version of the policy. She stated, correctly, that the policy "states the burden of proof is [on] the applicant to evidence that they meet the requirements of the Rules" but the reason given for not applying the policy was "that evidential flexibility does not need to be exercised if the submitted evidence does not meet the requirements." As we have seen, that is simply not what the policy says. The next sentence in the ECO's decision does not improve matters:

> Therefore, I am satisfied that the submitted evidence is inadequate because the test you sat does not meet the requirements of Appendix English language and I am not exercising Evidential Flexibility.

79. The reasoning appears to be simply that because the evidence does not meet the requirements of the rules, Evidential Flexibility will not be applied. To approach the matter in that way was flatly at odds with the policy. As Mr Malik submitted, if it was correct to refuse to exercise Evidential Flexibility in any case in which the evidence submitted did not meet the requirements of the Immigration Rules, the policy would be rendered otiose. There can be no doubt that the respondent erred in this respect.

80. It was for that reason that Ms Thelen sought to submit that the Evidential Flexibility policy simply did not apply to the circumstances of this case, in which the appellant was required by the Rules to provide a valid digital reference number and failed to do so. Had version 8 of the policy continued to apply, I would have accepted that submission. Had the law and the policy remained as it was in Mudiyanselage, the applicant would have been unable to mount any argument that evidential flexibility should have been applied.

81. As Mr Malik submitted, however, matters are entirely different under the current version of the policy. Ms Thelen submitted in her skeleton argument, with reference to Mudiyanselage, that the policy could not conceivably have come to the appellant's aid because he had taken the wrong test and there was no reason for the ECO to believe that the correct UKVI test certificate "existed". That is correct, and it would have been dispositive of this ground if that "consistent element" continued to appear in the policy. As I have endeavoured to explain, however, the respondent's staff must now consider whether evidence is missing which they believe that the applicant either *has or could obtain*.

82. There was evidently no reason to believe that the applicant had a valid UKVI reference number which met the requirements of paragraph EL6.1. He had submitted a basic IELTS certificate without a UKVI reference number and he had made no reference in any part of his application to having such a number. Mr Malik did not attempt to submit otherwise; he focused his submissions on the question of whether there was reason to believe that the applicant could obtain a UKVI reference number which showed the requisite level of proficiency in the English language.

83. Despite Ms Thelen's submissions to the contrary, the answer to that question is in my judgment quite plain: of course there was. The applicant had taken an IELTS test and had achieved a CEFR score at the level required by the Immigration Rules. IELTS is a recognised examiner and no doubt has ever, to my knowledge, been cast on the reliability of its assessments. The certificate which the applicant was awarded on 22 March 2024 bears his name and his photograph and a stamp which identified the IELTS test centre in Sri Lanka. There has never been any suggestion that the test was not taken or that the results

were not genuinely reflective of the applicant being able to communicate in English to the level B1 of the CEFR.

84. The question posed by the Evidential Flexibility Policy was whether the applicant could *obtain* a valid UKVI reference number to show his proficiency at level B1 of the CEFR. It was not whether he could *provide* it. The choice of verb must have been intentional, and is clearly of significance. The words "or could obtain" indicate that the respondent is prepared to countenance a situation in which a person who does not already have a document is requested to obtain it. That might involve a skilled worker such as the applicant taking a further English test, or it might involve an organ donor approaching an NHS Consultant for confirmation of when and where a planned transplant is to take place (V8.3 refers, as above). The fact that the person has not already provided that evidence, and the fact that they need to take additional steps to obtain it, is not sufficient to disapply the policy.

85. Ms Thelen made reference in her oral submissions to timescales. She drew attention to a later part of the current policy, which provides that "you must ask the applicant to provide the requested information within 10 workings days." As Mr Malik observed, however, the policy does not state that an ECO should only request additional documents when they have reason to believe that the applicant could obtain those documents within 10 days. The part of the policy to which Ms Thelen made reference is in the form of a process instruction. It is not expressed as an additional constraint on the decision maker and the usual ten day period is in any event subject to extension by agreement. It is therefore no answer to this ground to observe, as Ms Thelen did, that the applicant only managed to obtain the UKVI compliant certificate on 21 May 2024, a period of 22 days after the ECO's decision.

86. Ms Thelen invited me to conclude that the applicant's circumstances fell within the final paragraph of the guidance, which concerns situations in which evidence is missing or inadequate. The instruction to caseworkers in those situations is that they need not offer the applicant an opportunity "to prove that they meet the requirement in a different way." I was originally concerned that there might be a tension between this paragraph (and its two bullet pointed examples) and the preceding parts which refer to missing documents.

87. On further reflection, however, I consider the section to make sense when it is considered as a whole. The second example given in the guidance is of a person who says they are relying on funds in a bank account but the evidence does not show the required level of funds. The guidance states that there is no need to check whether the person has another bank account that might meet the requirements. Properly understood, however, I consider this to add nothing to the requirement that there must be reason to believe that the applicant either has further evidence or could obtain it. In the example given, there is no reason to believe that the hypothetical applicant has another bank account which might

meet the requirements of the Rules. In the instant case, however, the submission of a certificate at the correct CEFR level, from a renowned examining body, would have given any rational ECO reason to believe that he could obtain a UKVI compliant certificate at the same level. The ECO would not in those circumstances be providing a further opportunity to meet the Rules *in a different way;* they would be providing a further opportunity to obtain evidence to show that the Rules were met in the same way.

88. There must obviously be a reason for a decision maker to believe that an applicant could obtain the missing evidence. Here, the reason was provided by the fact that the applicant had already obtained the requisite level in the CEFR and had provided evidence of that. Had the initial certificate shown that he had scored CEFR level A1, there would have been no reason to contact him to suggest that he should provide a UKVI compliant certificate. To return to the example of the visiting organ donor without the necessary letter from an NHS consultant, there would be no need to contact him if there was no reason to believe that he could obtain that document. But if he had provided a letter from a specialist registrar within the NHS, and all that was needed was confirmation of his opinion by a more senior doctor, there would be a reason to believe that the document could be obtained. Whilst the policy is therefore rather wider than the Rule and its previous iterations, it is still subject to that common-sense constraint.

89. For all of these reasons, I am satisfied that the respondent erred in her approach to the Evidential Flexibility policy, version 11, and I find that ground two is made out.

Ground Three – Discretion Outside the Rules

90. It is accepted by Ms Thelen that the respondent erred in failing to consider whether to grant the appellant leave to remain outside the Immigration Rules. A specific request had been made for a grant of leave outside the Immigration Rules in the letter which accompanied the application. In those circumstances, as Mr Malik submitted, the effect of R (Behary) v SSHD is quite clear. There is an obligation to consider such a grant when expressly asked to do so, and, if but briefly, deal with any material relied upon by an applicant in support: Burnett LJ (as he then was) at [39], with whom Hallett LJ and Sir Stephen Richards agreed.

91. Ms Thelen therefore invokes section 31(2A) of the Senior Courts Act 1981, which applies to judicial review proceedings before the Upper Tribunal as a result of s15(5A) of the Tribunals, Courts and Enforcement Act 2007. She submits that the applicant should be refused relief despite the respondent's error because it is highly likely that the outcome for the applicant would not have been substantially different if that error had not occurred.

92. That submission was made rather belatedly, and counsel only made reference to two authorities on s31(2A) during their submissions. The first was the decision of Kate Grange KC in R (Cava Bien Ltd) v Milton Keynes Council [2021] EWHC

3003 (Admin). The second was the decision of Linden J in R (KTT) v SSHD [2021] EWHC 2722 (Admin) [2022] 1 WLR 1312. I was not referred to R (Bradbury) v Brecon Beacons National Park Authority [2025] EWCA Civ 489; [2025] 4 WLR 58, which was handed down 13 days before this hearing, and is now the leading authority on s31(2A).

93. I do not propose to set out the facts of Bradbury in any detail. What matters for present purposes is the guidance given by Lewis LJ (with whom Holgate and Nicola Davies LJJ agreed) on s31(2A). Jay J had refused relief on that basis and the Court of Appeal dismissed the appeal against his order, finding that the respondent had acted in breach of the Conservation of Habitats and Species Regulations 2017 but that it was highly likely that the grant of planning permission would not have been substantially different if the conduct complained of had not occurred.

94. At [73]-[74], Lewis LJ expressed doubt about the correctness of various aspects of the guidance in Cava Bien, finding that it was apt to mislead in important respects. He held that the proper approach to s31(2A) was instead as follows:

> The section emphatically does not require the court to embark on an exercise where the error is left out of account and the court tries to predict what the public body would have done if the error had not been made. Approaching section 31(2A) in that way would run the risk of the court forming a view on the merits and deciding if it thinks the public body would reach that view if it had not made the error. Rather, the focus should be on the impact of the error on the decision-making process that the decision-maker undertook to ascertain whether it is highly likely that the decision that the public body took would not have been substantially different if the error had not occurred.

95. Ms Thelen's submissions invited me to adopt the approach which Lewis LJ emphatically disapproved in that paragraph, by attempting to predict what the respondent would have said about the exercise of her discretion if she had turned her mind to it. Ms Thelen emphasised that the respondent attaches importance to the requirements of the Immigration Rules and that grants of LOTR are rare. The law in the latter respect was recently examined by Farbey J, in a very different context, at [8]-[12] of QP1 and QP2 v Secretaries of State for the Home Department and Defence [2025] EWHC 1388 (Admin). Ms Thelen also emphasised that there was very little said by the applicant's solicitors in this case to justify the unusual step of granting entry clearance to a skilled worker who did not meet the black and white requirements of the Rules.

96. Although I agree with those submissions, they invite me to venture into territory which is forbidden for the reasons given by the Court of Appeal at [273] of R (Plan B Earth) v Secretary of State for Transport & Ors [2020] EWCA Civ 214; [2020] PTSR 1446:

> It would not be appropriate to give any exhaustive guidance on how these provisions should be applied. Much will depend on the particular facts of the case before the court. Nevertheless, it seems to us that the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law. Furthermore, although there is undoubtedly a difference between the old *Simplex* test and the new statutory test, "the threshold remains a high one" (see the judgment of Sales L.J., as he then was, in *R. (on the application of Public and Commercial Services Union) v Minister for the Cabinet Office* [2017] EWHC 1787 (Admin); [2018] 1 All ER 142, at paragraph 89).

97. It is not for me to attempt to predict how the respondent might have acted if she had turned her mind to the request. As Mr Malik noted, there is no witness statement or other evidence from an official to explain the outcome which would have been reached if she had done so. The error was a fundamental one, in that the respondent ignored the request altogether, and it is simply not possible to know whether it is highly likely that the decision would have been the same if that error had not occurred.

98. It follows that ground three is also made out, and I decline the respondent's invitation to refuse relief under s31(2A).

Ground One – Submission of Additional Evidence on Administrative Review

99. The process of administrative review applies to certain "eligible decisions". That term is defined at AR2.1. Refusals of entry clearance and leave to enter and remain on certain specified routes under the Immigration Rules are eligible decisions. So too are decisions to cancel entry clearance or leave to enter or remain in certain circumstances.

100. Administrative Review is designed to decide whether the decision was "incorrect" because the eligible decision failed to apply, or incorrectly applied, the relevant Immigration Rules; or the eligible decision failed to apply, or incorrectly applied, published guidance. What must be shown is therefore for a defined type of "incorrectness" in the original decision. So much is clear from AR 3.1, as set out at 42 above.

101. Administrative review generally takes place on the basis of the evidence which was before the original decision maker. That basic rule is clear from paragraph AR3.3.

102. The basic rule is subject to five exceptions. The first three, in paragraphs AR3.3(a)-(c), relate to situations in which the applicant is suspected of some sort of wrongdoing which has resulted in refusal under Part 9 of the Immigration Rules. Where the eligible decision was based wholly or partly on such a ground of refusal, additional evidence is admissible at Administrative Review, whether or not the eligible decision was incorrect. The making of an allegation of deception, for example, suffices without more to open the gateway. Whilst I heard no argument on the point, I suspect that the rationale behind that approach is an attempt to comply with the common law duty of fairness considered in Balajigari v SSHD [2019] EWCA Civ 673; [2019] 1 WLR 4647 and other cases. Where, for example, an allegation of deception is made against a person in the original decision, they have an unfettered right on Administrative Review to submit further evidence in response to the allegation.

103. It is the fourth and fifth exceptions to the general rule with which I am concerned in this case. To recap, those exceptions permit the consideration of evidence which was not before the decision maker "where the eligible decision was … (d) a decision not to request specified documents under paragraph 245AA of these Rules; or (e) a failure to follow the evidential flexibility policy published on gov.uk".

104. Before I consider those provisions, I note that Ms Thelen was constrained to accept in her response to this ground that the reasoning in the Administrative Review decision bears no real resemblance to the relevant tests for the admission of further evidence in Appendix AR. The respondent gave three reasons for concluding that the new UKVI certificate was not eligible for consideration. She stated that the evidence would not be considered because it was not evidence that:
    (i) was supplied previously but was not considered or considered incorrectly;
    (ii) seeks to prove that documents assessed to be false were, in fact, genuine; and
    (iii) seeks to prove the date of the previous application.

105. Ms Thelen was unable to provide any indication as to the origin of these three bullet points in the Administrative Review decision. She had been unable to find any policy or other document which stated the test in that way, which is evidently rather far removed from the Immigration Rules in any event. As with grounds two and three, therefore, Ms Thelen was not able to argue that the respondent's decision was free from legal error. She submitted, instead, that the respondent could not have admitted the additional certificate at the Administrative Review stage if she had applied the law correctly.

106. As with ground three, however, that submission invites me into the forbidden territory of attempting to predict what the respondent would have made of the additional material if she had applied the law correctly. As with ground three, there is no witness statement in support of Ms Thelen's submission, and there is no proper evidential basis provided by the Secretary of State to discharge the burden upon her of showing that it is highly likely that the outcome for the applicant would not have been substantially different if the respondent had not fallen into error in this way. That conclusion means that this ground is made out but I will nevertheless consider the detailed submissions which I heard on Appendix AR.

The Obvious Drafting Error in AR3.3(d) and (e)

107. The most obvious feature of AR3.3(d) and (e) is that they are poorly expressed, as Mr Malik submitted and as Ms Thelen was constrained to accept.

108. An "eligible decision" is a decision which was made on a person's application for entry clearance (etc). Such a decision might *contain* a decision not to request specified documents under paragraph 245AA or it might *involve* a decision not to request additional evidence under the published evidential flexibility policy, but the decision cannot *be* a decision not to request specified documents or a failure to follow the evidential flexibility policy. Those are only aspects of the eligible decision. It is apparent that something has gone awry with the drafting of these provisions.

109. That is a regrettable state of affairs. The Court of Appeal grappled with a similar problem in Hoque v SSHD [2020] EWCA Civ 1357; [2020] 4 WLR 154, in which a sentence in paragraph 276B of the Rules had been inserted in the wrong place. Underhill LJ recently reviewed that and other authorities in Mustaj v SSHD [2025] EWCA Civ 663, noting that the court had for some time been able to correct obvious drafting errors in statute, as explained by Lord Nicholls in Inco Europe Ltd v First Choice Distribution [2000] UKHL 15; [2000] 1 WLR 586, at p592. Underhill LJ suggested that the law provided for at least an equivalent latitude to correct obvious errors in the Immigration Rules.

110. Whilst I respectfully agree, the judicial correction of drafting errors in the Immigration Rules brings with it an obvious danger. The Immigration Rules should be expressed in a way which is clear to applicants and their advisers and the civil servants tasked with their application. Frequently, they are not. Underhill LJ noted at [4] of Mudiyanselage that the Rules were drafted "in a rebarbative system which makes navigation far from straightforward". Matters have become considerably worse since then, and the Immigration Rules are now painfully difficult to navigate (and to understand) as a result of the replacement of sequentially numbered provisions with a myriad of appendices which appear

in no logical order and which contain paragraphs which are identified by a complex system of letters and numbers, often with multiple decimal points.

111. It is to my mind undesirable that a further layer of complexity is added atop this spider's web by judges seeking to correct the provisions in question. If, as seems likely, no action is taken to correct the drafting errors which lead to those corrections, those who make and decide applications under the Immigration Rules must locate and understand both the Rules and the judicial decisions in which they have been corrected, leading to obvious potential for error. It would be far better if the Immigration Rules made sense in the first place.

112. Be that as it may, I was invited by Mr Malik and Ms Thelen to construe paragraph AR3.3 in accordance with the principles I have set out above, and I will do so.

113. The correction of the obvious drafting error to which I have referred above is a simple matter. The eligible decision cannot be a decision not to request specified documents or a failure to follow the evidential flexibility policy. What must have been intended is that the eligible decision was *one which included* a decision not to request specified documents or a failure to follow the evidential flexibility policy. The insertion of those three words at the start of paragraphs AR3.3(d) and (e) merely ensures that they make sense and are consistent with the overall scheme of the appendix.

114. Paragraphs AR3.3(d) and (e) of Appendix AR of the Immigration Rules therefore permit a reviewer to consider evidence which is submitted with an application for Administrative Review and which was not before the original decision maker where the eligible decision was one which included a decision not to request specified documents under paragraph 245AA of the Rules, or one which included a failure to follow the EFP published on gov.uk.

115. That obvious problem having been corrected, the proper construction of AR3.3(d) and (e) is more problematic and they must be considered separately.

The Admission of Further Evidence Under Paragraph AR3.3(d)

116. The most striking feature of AR3.3(d) is the absence of any requirement that the decision not to request specified documents under paragraph 245AA was erroneous or incorrect. In that respect, the current provision is markedly different from its predecessor.

117. Appendix AR was replaced in its entirety in April 2024 by HC 590. Ms Thelen helpfully provided the current and previous versions shortly after the hearing. Much of the terminology was changed, and the gateways through which additional evidence might be submitted at Administrative Review were reconfigured. Under the pre-April 2024 scheme, however, there was a similar presumption that the reviewer would not consider evidence which was not

before the original decision maker: previous AR2.4 referred. As with the current scheme, that general rule was subject to certain exceptions. The first exception was where additional evidence was submitted to show that a caseworking error as defined in AR2.11(a), (b) or (c) had been made. The caseworking error defined at AR2.11(c) was:

> (c) Where the original decision maker's decision not to request specified documents under paragraph 245AA of these Rules was incorrect.

118. The change effected to this gateway is stark. Whereas the admission of additional evidence on Administrative Review used to depend on the establishment of incorrectness in the original decision maker's approach to paragraph 245AA, there is no such stipulation in the current version. Given the way in which the gateway was previously framed, the only sensible construction is that no such error is required, and that paragraph AR 3.3(d) permits the submission of additional evidence on Administrative Review where the original decision was one which included a decision not to request specified documents under paragraph 245AA of the Immigration Rules. An applicant is not additionally required to demonstrate that the decision not to request documents was erroneous or incorrect.

119. I cannot presently understand why the Secretary of State would have decided to make such a change, and there is no explanation in the Explanatory Memorandum to HC590, but that is the ordinary and natural meaning of the words used. The obvious consequence is that applicants under the "simple, predictable and expeditious" PBS will have a second bite at the cherry in any case in which the respondent has decided not to request specified documents under paragraph 245AA of the Immigration Rules.

120. The respondent took no such decision in this case, however. There is no reference to paragraph 245AA in the ECO's decision. Insofar as she considered whether to give the applicant a further opportunity to submit the valid digital reference number required by paragraph EL6.1 of the Rules, any such consideration was with reference to the "evidential flexibility guidance". That was – and could only have been – a reference to the Evidential Flexibility policy, and not to paragraph 245AA of the Immigration Rules.

121. It is not surprising that the respondent took no decision not to request specified documents under paragraph 245AA. As Ms Thelen submitted, this was not a case in which that discretion was available to the respondent. For that paragraph to apply, an applicant must have "submitted the specified documents". This applicant had not done so. He had submitted a document (the IELTS certificate) which he was positively advised not to submit: [77] above refers. He had failed to submit the specified document (the UKVI reference number) which he was required to submit.

122. Mr Malik nevertheless submitted, with reference to what Underhill LJ said at [57]-[58] of Mudiyanselage, that the IELTS certificate was the specified document which the applicant was required to submit. I disagree. The IELTS certificate was not a specified document. The UKVI reference number was the document specified in the Rules. The information which was missing was so wholesale as to affect the fundamental character of the document. It was simply the wrong document which was submitted.

123. It was in those circumstances that the respondent did not even consider whether to request further documents under paragraph 245AA. She was unable to do so in circumstances in which the condition precedent (the submission of the specified documents) was not satisfied.

124. There having been no decision not to request specified documents under paragraph 245AA, the gateway in paragraph AR3.3(d) was not open, and I reject the applicant's arguments to the contrary.

The Admission of Further Evidence Under Paragraph AR3.3(e)

125. I turn finally to AR3.3(e). The language used in this provision is rather clearer, referring as it does to a "failure" to follow the Evidential Flexibility policy. The use of that term necessarily requires that there was an error as to the application of the policy in the original decision. It is to be contrasted with the choice of words in the preceding provision, which applies where there has been any decision not to request specified documents under paragraph 245AA. A "failure" is not merely a decision, and Mr Malik's suggested construction ("a decision not to request documents under the Evidential Flexibility policy") fails to respect that distinction. As Ms Thelen submitted, the natural and ordinary meaning of the provision is that the gateway in AR3.3(e) is open, and additional evidence may be submitted on Administrative Review, when there has been a substantive error in refusing to follow the Evidential Flexibility policy. Paragraph AR3.3(e) therefore permits the submission of additional evidence on Administrative Review where there was a substantive error in the respondent's decision not to follow the Evidential Flexibility policy.

126. I have already concluded in my resolution of ground two that there was in this case a substantive error in the respondent's refusal to follow the Evidential Flexibility policy. She failed to direct herself according to the wide terms of the policy, which were prima facie applicable to the missing UKVI reference number.

127. I therefore conclude that the gateway in AR3.3(e) was open for the admission of further evidence on Admin Review, and that ground one is also made out.

Summary of Conclusions

128. For the reasons given above, I conclude that each of the applicant's grounds are made out. My conclusions are as follows:

(i) *Ground Two.* The ECO's original decision was vitiated by her failure to apply the Evidential Flexibility policy correctly and that policy was prima facie applicable in circumstances in which there was reason to believe that the applicant could obtain the missing document.

(ii) *Ground One.* The Administrative Review decision was vitiated by the respondent's failure to consider the test for the admission of further evidence in paragraph AR3.3. It is not clear that the same outcome would have been reached if the correct approach had been applied. Gateway (d) was not available to the applicant but gateway (e) was available.

(iii) *Ground Three.* The ECO's original decision and the Administrative Review decision were unlawful for failing to consider whether to grant leave outside the Rules, and it is not clear that the same outcome would have been reached if the correct approach had been applied.

129. I invite counsel to agree the terms of the order.

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